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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 619

CHESTER E. JACKSON, PETITIONER,

VS.

JOHN C. TAYLOR, ACTING WARDEN

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

PETITION FOR CERTIORARI FILED AUGUST 21, 1956

CERTIORARI GRANTED DECEMBER 10, 1956

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from the United States District Court for the Middle District of Pennsylvania	1	1
Complaint and petition for writ of habeas corpus	a	a
Record of trial—General Court Martial (omitted in printing)	aa	
Decision of Board of Review (omitted in printing)	ab	
Order of United States Court of Military Appeals denying petition for review (omitted in printing)	ae	
Rule to show cause	7	1
Response to rule to show cause	8	1
Opinion, Follmer, J.	16	7
Order discharging writ of habeas corpus	25	15
Proceedings in the United States Court of Appeals for the Third Circuit	26	15
Stipulation of counsel for substitution of a party and approval thereof	26	15
Opinion, Hastie, J.	27	16
Judgment	34	22
Order staying issuance of mandate (omitted in printing)	35	
Clerk's certificate (omitted in printing)	36	
Order allowing certiorari	37	23

[a] In the United States District Court for the Middle
District of Pennsylvania

CHESTER E. JACKSON, PLAINTIFF

VS.

GEORGE W. HUMPHREY, WARDEN, DEFENDANT

COMPLAINT AND PETITION FOR WRIT OF HABEAS CORPUS—
Filed March 29, 1954

Plaintiff herein, as and for his Complaint against the defendant, and for his Petition for a Writ of Habeas Corpus complains against the defendant and respectfully represents and shows to the Court:

(1) That he is a United States citizen, and at the date hereof is imprisoned in the U. S. Penitentiary at Lewisburg in the Middle District of Pennsylvania.

(2) That the defendant is the Warden of said U. S. Penitentiary.

(3) That on the 8th day of June, 1951, he, and two (2) companions, were brought to trial at Haengsong, Korea, before an Army Court-Martial, charged in manner and form as follows, to wit:

CHARGE: Violation of the 92d Article of War.

Specification 1: In that Private First Class Chester E. Jackson, Headquarters, Headquarters and Service Company, 72d Tank Battalion, APO 248, did, at Chudong-ni, South Korea, on or about 16 March 1951, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill an adult Korean female person whose name is unknown, a human being, by shooting her in the head with a pistol or carbine.

Specification 2: In that Private First Class Chester E. Jackson, Headquarters, Headquarters and Service Company, 72d Tank Battalion, APO 248, did, at Chudong-ni, South Korea, on or about 16 March 1951, forcibly and feloniously, against her will, have carnal knowledge of an adult Korean female person whose name is unknown.

b.

(4) That upon conclusion of the trial, the Court announced the following findings or determination as to guilt of your petitioner:

[b] PRES. Private First Class Chester E. Jackson, it is my duty as president of this court to inform you that the court in closed session, and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, finds you:

Of Specification 1, guilty.

Of Specification 2, guilty, except the word, "have"; substituting therefor the words, "attempt to have;" of the excepted word, not guilty, of the substituted words, guilty.

Of the Charge as to Specification 1, guilty; as to Specification 2, not guilty, but guilty of a violation of Article of War 96.

(5) That immediately thereafter, the Law Officer of the Court advised the members of the Court as follows:

LC: Each accused stands convicted of Specification 1, violation of the 92d Article of War. The punishment on a conviction of the 92d Article of War must be either death or life. It cannot be other than those two sentences. This is provided in the Manual for Courts-Martial 1949; page 296, "Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct." The court will be closed.

(6) That thereafter the Court was closed at 11:50 A.M. on the 9th day of June, 1951, for deliberation as to the sentence to be imposed, and after twenty (20) minutes of deliberation the Court was opened, that is to say, at 12:10 P.M. on June 9, 1951; thereupon the Court announced the following sentence:

Private First Class Jackson, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, three-fourths of the members present at the time the vote was taken concurring, sentences you to be dishonorably dis-

charged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for the term of your natural life.

(7) That the Law Officer of the Court did not instruct the Court on the subject of the sentence for the violation of the 96th Article of War--Specification 2, as amended by the Court to read, " * * * against her will, attempt to have carnal knowledge of an adult Korean female person whose name is unknown."

(8) That the Court did not at that time or at any other time adjudge any penalty or fix a punishment, or in any way or manner sentence your petitioner to imprisonment or confinement of any kind on account of the violation of Article of War 96 as described in Specification 2 as amended.

[c] (9) That the conviction and the sentence of your petitioner were subsequently reviewed by the Board of Review established in the office of the Judge Advocate General, pursuant to and by authority of the Uniform Code of Military Justice (64 Stat. 107).

(10) That on the 15th day of June, 1952, the said Board of Review announced its decision stating among other things, (p. 14) :

"In the absence of adequate proof linking the acts of the accused with the death of the victim of the attempted rape, we conclude that the findings of guilty of murder (Specification 1) are incorrect in law and fact and should be set aside (MCM, 1949, subpar. 179a, p. 232, "Proof").

In the light of this determination, it is unnecessary to discuss the propriety of the law officer's instruction pertaining to this specification."

(11) That although the life imprisonment sentence was imposed for the crime of murder for which the defendant was convicted, and that although such conviction was set aside by the Review Board for lack of sufficient evidence, nevertheless the Review Board did not set aside the entire sentence and set aside all of the sentence, except twenty

d

(20) years, as appears by the following except of their decision, (p. 14):

“By reason of the foregoing conclusions and the action herein taken as to the murder specification, the sentences of confinement at hard labor for life are improper. Under the vicious circumstances in this case, a sentence of dishonorable discharge, total forfeitures and confinement at hard labor for twenty (20) years is appropriate for conviction of an attempt to commit rape.”

(12) That said Review Board has no power or authority under the Acts of Congress or the rules or regulations prescribed by the President to fix or determine any sentence for any crime but that said Review Board, by indirection, illegally and wrongfully, *by* effectively, sentenced your petitioner for a term of twenty (20) years of imprisonment, even though a General Court-Martial is the only tribunal having such authority.

(13) That the General Court-Martial before which your petitioner was tried, in amending Specification 2 to read, “attempt to have carnal knowledge,” laid said crime as a violation of the 96th Article of War, which Article is generally regarded as the “disorderly conduct” charge by [d] officers of the Army and which reads as follows:

“Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial; according to the nature and degree of the offense, and punished at the discretion of such court.”

(14) That the Review Board upon its reversal of the conviction for murder, and upon finding that the Trial Court had failed to assess a penalty for the violation of the 96th Article of War, should have remanded the case to the Trial Court for the purpose of fixing an appropriate sentence, or for a new trial.

(15) That the penalty which the said Review Board has attempted to fix against your petitioner is the maximum penalty permitted for the offense charged, and that said Review Board, in fixing said penalty did, by its language, to wit: "Under the vicious circumstances in this case a sentence of * * * twenty (20) years is appropriate * * *" indicate quite clearly, that although it had set aside the conviction of murder, it attempted, nevertheless, to punish your petitioner as and for such a crime. Your petitioner further invites the court's attention to an entire transcript attached hereto to show that, apart from the unhappy circumstance of the woman losing her life by means other than the hand or design of your petitioner, there were no "vicious circumstances" in the case, and that the actions of your petitioner were committed while he and his companions were intoxicated, and that such actions were more the outgrowth of wild soldiers on a lark, than they were the acts of men with genuine or real or vicious urge or inclination to have carnal knowledge with the unfortunate woman. Your petitioner further and specifically invites the court's attention to the confession obtained by the investigating officers and to the testimony of Sgt. Tigner on p. 37 of the transcript of testimony attached hereto.

(16) That said Review Board failed to heed the precepts of the Manual for Courts-Martial and the uniform Code of Military Justice, which provide that the Military Court in the exercise of its discretion in adjudging a sentence, should take in consideration the previous good character of the accused, penalties adjudged in other cases for similar offenses, the youthfulness of the offender, and the fact of his intoxication at the time of the offense.

(17) That your petitioner is imprisoned by color of authority of the United States, but that such imprisonment is unlawful and improper for the reason that he has never been sentenced by an Army Court-Martial for any crime for which he stands convicted, and such a Court was, and now remains, the only tribunal with authority to pass sentence on him.

(18) That the action of the Review Board in reserving twenty (20) years of the life sentence imposed by the Court-Martial for the crime of murder, even though it had reserved and set aside the conviction, was null and void.

(19) That there are attached to this Complaint and Petition a true, correct and complete transcript of the testimony taken by the Court-Martial referred to, together with the decision of the Board of Review hereinabove referred to, and the Petition for Grant of Review, and the Order issued by the United States Court of Military Appeals denying said Petition.

WHEREFORE, YOUR PETITIONER PRAYS that a Writ of Habeas Corpus may issue from said Court directed to the defendant and requiring him to bring before the Court the person of your petitioner to the end that the legality of his imprisonment may be judicially determined.

CHESTER E. JACKSON;
Plaintiff.

Duly sworn to by Chester E. Jackson. Jurat omitted in printing.

[f-g] [File endorsement omitted.]

[1-7] United States District Court for the Middle District
of Pennsylvania

[Title omitted]

RULE TO SHOW CAUSE—Filed April 2, 1954

NOW, to wit, April 2, 1954, upon consideration of the Petition filed in this cause, Rule is hereby granted upon the Respondent, George W. Humphrey, Warden, U. S. Penitentiary, Lewisburg, Pennsylvania, to show cause why a writ of habeas corpus should not be granted.

Rule returnable April 26, 1954.

A determination as to whether the petitioner should be produced for a hearing will be held in abeyance pending the filing of the Response and any traverse thereto.

FREDERICK V. FOLLMER,
United States District Judge.

[7a] United States District Court, Middle District of
Pennsylvania, 282 H.C.

[File endorsement omitted.]

[8] In United States District Court for the
Middle District of Pennsylvania

[Title omitted]

RESPONSE TO RULE TO SHOW CAUSE—Filed April 26, 1954

Comes now the respondent, George W. Humphrey, Warden, United States Penitentiary, Lewisburg, Pennsylvania, upon whom has been served a rule to show cause why a writ of *habeas corpus* should not issue for the production of Chester E. Jackson, and, by counsel, makes the following return to the said order, and respectfully shows that he holds the said Chester E. Jackson in custody as a

prisoner by authority of the United States, pursuant to a sentence of a general court-martial of the United States Army under the following circumstances:

I

That the said Chester E. Jackson was lawfully enlisted into the Army of the United States in the grade of private for a term of three years on 24 November 1947 (Exhibit A), and the said enlistment was extended for one year by operation of law (Act of 27 July 1950; 64 Stat. 379).

II

That on 21 May 1951 the said ~~Chester E. Jackson~~ was served with charges which alleged that on or about 16 March 1951, at Chudong-ni, South Korea, the said Chester E. Jackson did, in violation of Article of War 92 (formerly 10 USC 1564), murder an adult Korean female person whose name is unknown (Exhibit B).

[9]

III

That on 21 May 1952, the said Chester E. Jackson was served with charges which alleged that on or about 16 March 1951, at Chudong-ni, South Korea, the said Chester E. Jackson, in violation of Article of War 92, *supra*, did rape an adult Korean female person whose name is unknown (Exhibit B).

IV

That the said Chester E. Jackson was duly arraigned for this offense before a general court-martial, convened by paragraph 14, Special Orders No. 148, Headquarters 2d Infantry Division, APO 248, c/o Postmaster, San Francisco, California (Exhibit C, page 1). That the said Chester E. Jackson was convicted of attempted rape, and of murder, by the said general court-martial and was sentenced on 9 June 1951 to be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for life (Exhibit C, page 56).

V

That pursuant to the provisions of the Uniform Code of Military Justice, Article 61 (50 USC 648), the convening authority referred the record of petitioner's trial to his staff judge advocate for review. That the said staff judge advocate, after a review of said record of trial, submitted his written opinion thereon to the convening authority, in which he found that the sentence imposed upon the petitioner was correct in law and fact and recommended that the sentence be approved (Exhibit D).

[10]

VI

That on 3 July 1951, the sentence adjudged by the general court-martial was approved by the convening authority (Exhibit E). That the results of the petitioner's trial and the initial action of the convening authority were promulgated by General Court-Martial Orders Number 45, Headquarters 2d Infantry Division, APO 248, c/o Postmaster, San Francisco, California, dated 3 July 1951 (Exhibit F).

VII

That pursuant to the Uniform Code of Military Justice, Article 66 (50 USC 653), a Board of Review in the Office of The Judge Advocate General of the Army, reviewed the record of trial. That on 15 January 1952, the said Board of Review approved only so much of the findings of guilty as found the petitioner guilty of attempted rape in violation of Article of War 96 (formerly 10 USC 1568), and only so much of the sentence as included dishonorable discharge, total forfeitures, and confinement at hard labor for twenty years. The said Board of Review held that the findings and sentence, as thus approved, were correct in law and fact, and affirmed the findings and sentence as thus modified (Exhibit G).

VIII

That pursuant to the provisions of the Uniform Code of Military Justice, Article 67(b)(3) (50 USC 654), the petitioner after having been served with a copy of the decision of the Board of Review and notified of his right to appeal to the United States Court of Military Appeals for a grant

of review, elected to pursue that remedy, and at his request, appellate defense counsel filed a petition for grant of review and brief in support thereof on 29 April 1952 (Exhibit H). Appellate Government counsel filed a brief on behalf of the United States in opposition to the petition for grant of [11] review, on 2 May 1952 (Exhibit J), and on 2 June 1952 an order was issued by the said United States Court of Military Appeals denying said grant of review (Exhibit K).

IX

That the provisions of the Uniform Code of Military Justice, Article 71(c) (50 USC 658), having been complied with; General Court-Martial Order Number 709 was promulgated by the Commanding Officer, Camp Cooke, California, on 30 June 1952, the petitioner then being held in confinement at Camp Cooke, California. That the said order directed execution of the sentence to dishonorable discharge from the service, total forfeitures, and confinement at hard labor for twenty years, and directed that the petitioner be committed to the custody of the Attorney General of the United States or his designated representative for classification, treatment, and service of sentence to confinement (Exhibit L).

X

That the respondent lawfully holds the said Chester E. Jackson in custody under and by virtue of the aforesaid General Court-Martial Order Number 709, Headquarters Camp Cooke, California, dated 30 June 1952 (Exhibit L).

XI

Answering the following allegations in the "Complaint and Petition for Writ of Habeas Corpus" filed with this Court by the petitioner, the respondent admits, denies, and alleges as follows:

[12] 1. The respondent *admits* the allegations in paragraphs (1), (2), (3), and (4) of the petition.

2. The respondent *admits* that portion of paragraph (5) of the petition which sets forth the instruction on sentence given by the law officer, but *denies* that this instruction was

given immediately after the announcement of the findings.

3. The respondent *admits* the allegations in paragraph (6) and (7) of the petition.

4. The respondent *denies* the allegations in paragraph (8) of the petition.

5. The respondent *admits* the allegations in paragraphs (9) and (10) of the petition.

6. The respondent *admits* that portion of paragraph (11) of the petition which alleges that the petitioner was sentenced to life imprisonment, and that the Board of Review set aside all of the confinement in excess of twenty years, but *denies* the remaining allegations in said paragraph.

7. The respondent *denies* the allegations in paragraph (12) of the petition.

8. The respondent *admits* that portion of paragraph (13) of the petition which alleges that the petitioner was convicted of a violation of the 96th Article of War, *supra*, and *admits* that portion of paragraph (13) of the petition which sets forth the said 96th Article of War *in hæc verba*, but the respondent *denies* the remaining allegations in said paragraph.

9. The respondent *denies* the allegations in paragraph (14) of the petition.

10. The respondent *admits* that portion of paragraph (15) which alleges that the period of confinement sustained [13] by the Board of Review is the maximum permissible, but the respondent *denies* the remaining allegations of the said paragraph.

11. The respondent *denies* the allegations in paragraph (16) of the petition.

12. The respondent *admits* that portion of paragraph (17) of the petition which alleges that the petitioner is imprisoned by authority of the United States, but the respondent *denies* the remaining allegations of the said paragraph.

13. The respondent *denies* the allegations in paragraph (18) of the petition.

14. The respondent *admits* the allegations in paragraph (19) of the petition.

XII

For further answer, the respondent avers:

1. That the general court-martial by which the petitioner was convicted had jurisdiction over the person of the accused; that the offenses of which the petitioner was convicted were offenses over which the said general court-martial had jurisdiction; and that the said general court-martial, having been legally constituted, and the sentence being within the maximum authorized sentence for the offense of which the petitioner was found guilty, as modified and affirmed by the Board of Review, acted within the scope of its lawful powers.

2. That the instruction of the law officer as to sentence (Exhibit C, page 56) was given only after the full and proper presentencing procedure required by Appendix 8a, pages 520 and 521, *Manual for Courts-Martial, United States, 1951*, had been completed (Exhibit C, pages 54 and 55), and not immediately after the announcement of the findings of guilty by the president of the court-martial which tried the petitioner.

[14] 3. That all sentences imposed by a court-martial under military law are entire and single. That, accordingly, the law officer was under no duty to instruct the court-martial, on the maximum sentence imposable for attempted rape in violation of the 96th Article of War, *supra*.

4. That the sentence imposed by the court-martial upon the petitioner included a sentence for the offense of attempted rape, an offense included in the offense of rape charged, since a sentence of a court-martial is a sentence imposed for all the offenses of which an accused person has been convicted.

5. That the sentence imposed upon the petitioner, having been so imposed for all of the offenses of which the petitioner had been convicted, was divisible, and the Board of Review acted within its lawful powers in upholding the portion thereof which it approved (Uniform Code of Military Justice, Article 66(c), *supra*).

6. That the appropriateness of a sentence which is within the maximum authorized sentence is not within the scope of review by civil courts on *habeas corpus*.

7. That the Uniform Code of Military Justice (50 USC

554-736) provides an appellate process within the military establishment to review the proceedings of courts-martial, to ferret out irregularities in the trial, and to enforce the procedural safeguards which Congress determined to guarantee to those in the nation's Armed Services. That the trial of an appellate action on the petitioner's case were in conformity with the said Uniform Code of Military Justice, and the *Manual for Courts-Martial, United States, 1951* (16 Fed. Reg. 1303-1469).

[15] WHEREFORE, the respondent respectfully prays this Court that the order to show cause be discharged, the petition for writ of *habeas corpus* be dismissed, and the said Chester E. Jackson remain in the custody of the respondent.

J. JULIUS LEVY,
United States Attorney.

ROGER A. WOLTJEN,
*Assistant United States Attorney,
Counsel for Respondent.*

JAMES K. GAYNOR,
*Lieutenant Colonel,
Judge Advocate General's Corps,
United States Army,
Of Counsel.*

[15a] No. 282 Habeas Corpus

[File endorsement omitted.]

[16] United States District Court, for the Middle District
of Pennsylvania

Habeas Corpus No. 282

CHESTER E. JACKSON, PETITIONER

vs.

GEORGE W. HUMPHREY, WARDEN, RESPONDENT

OPINION—November 25, 1955

The petitioner, now a prisoner at the United States Penitentiary, Lewisburg, Pennsylvania, seeking a Writ of Habeas Corpus, was a soldier in the United States Army at

the time he was convicted by general court-martial in Korea on June 8, 1951. He was found guilty of the premeditated murder of a Korean woman on March 16, 1951, in violation of Article of War 92 (10 U.S.C. § 1564), and of the attempted rape of said person, in violation of Article of War 96 (10 U.S.C. § 1568). The general court-martial sentenced petitioner to be dishonorably discharged, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life.

On July 3, 1951, the sentence was approved by the convening authority of the general court-martial.

[17] On January 15, 1952, a board of review in the office of The Judge Advocate General set aside the conviction for premeditated murder and sustained the conviction for attempted rape. Consequently, it held the sentence of confinement at hard labor for life was improper and stated: "Under the vicious circumstances in this case, a sentence of dishonorable discharge, total forfeitures and confinement at hard labor for twenty (20) years is appropriate for conviction of an attempt to commit rape."¹ The sentence, as modified, was affirmed.

Although the charges under which petitioner was tried alleged violations of the Articles of War, the Uniform Code of Military Justice (50 U.S.C. § 51 et seq.) became effective on May 31, 1951, so that the trial on June 8, 1951 and subsequent proceedings were had under the Uniform Code.

The Law Officer, under the Uniform Code, does not deliberate with the court but is required to instruct the court upon the applicable law in the case (Article 51 (c) of the Uniform Code of Military Justice, 50 U.S.C. § 626).

The Law Officer instructed the court-martial that since the accused had been found guilty of premeditated murder, the only sentences authorized by law were death or imprisonment for life (Article of War 92, 10 U.S.C. § 1564).²

[18] He made no reference to the maximum for attempted rape, but this would have been superfluous since in court-

¹ Record of Trial, Respondent's Exhibit G, Page 14.

² Which is similar to the provision in Article 118 of the Uniform Code (50 U.S.C. § 712).

martial practice a sentence is entire and single, or, as is commonly stated, a general or gross sentence, and the court was required as a consequence of the conviction for pre-meditated murder, to impose a sentence of either death or life imprisonment.

Petitioner contends that the board of review having set aside the murder conviction for lack of evidence and having affirmed the conviction for attempted rape, should have ordered a rehearing or that the charges be dismissed, and as a sequitur, that petitioner should be released in this habeas corpus proceeding. What petitioner is in effect contending is that unless there are concurrent sentences on the various specifications as might be imposed on various counts of an indictment in the civil courts, the prisoner goes set free if the military board of review sets aside the conviction on one of the specifications.

Col. Winthrop in 1896 in his classic treatise³ on military law states:

“In the absence of any statutory direction on the subject, usage has established that the sentence of a court-martial shall be, in every case, an *entirety*; that is to say that there shall be but a single sentence covering all the convictions on all the charges and specifications upon which the accused is found guilty, however separate and distinct may be the different offences found, and however different may be the punishments called for by the offences.”⁴

[19] This practice has never been changed in any Articles of War, Manuals for Courts-Martial or the recent Uniform Code of Military Justice. This was recognized by the Court of Military Appeals in *United States v. Keith*, 4 Court-Martial Reports, 34, 40,

“* * * The concurrent sentence, in the sense in which that device is utilized in the administration of criminal

³ See comment in *Toth v. Quarles*, Slip Opinion United States Supreme Court, November 7, 1955, Note 8.

⁴ *Winthrop's Military Law and Precedents*, 2d Ed. (1920), Page 404.

law in the civilian community, is entirely without precedent in military procedure. See Manual for Courts-Martial, *supra*, paragraphs 76, 125, 126, 127. Under military law a single inclusive sentence is imposed—the sum of individual punitive actions deemed legal and adequate—regardless of the number or character of the offenses of which the accused has been convicted. It will be obvious that a rule which has its basis in a concurrent sentence situation is not an appropriate subject for importation into a system in which the instrument lying at the basis of the principle is unknown, and a unitary sentence is always assessed.”

Nor is the gross or general sentence unknown to the civil law. In *Jones v. Hill*, 3 Cir., 71 F. 2d 932, it was recognized that

“ * * * The great weight of authority in the federal courts holds that such sentences are not void and that a general or gross sentence may be imposed under an indictment containing more than one count so long as it does not exceed the aggregate of the punishments which could have been imposed upon the several counts. * * * ”

While there has been a tendency in some of the civil courts recently to criticize the general sentence as loose practice,⁶ it certainly does not involve a want of due process or affect the jurisdiction or power of the military courts. Neither is there anything startling or shocking in the construction by the military courts that a general sentence, where conviction on one or more specifications is set aside, remains valid to the extent that it is applicable to the remaining specifications. The civil courts have, in the past, applied the same doctrine. In *McKee v. Johnston, Warden*, 9 Cir., 109 F. 2d 273, a general sentence of seventeen years

⁶ See also *McDowell v. Swope*, 9 Cir., 183 F. 2d 856, 858; *United States v. Sposato*, 2 Cir., 73 F. 2d 186; *McKee v. Johnston, Warden*, 9 Cir., 109 F. 2d 273.

⁷ *McDowell v. Swope*, 9 Cir., 183 F. 2d 856; *United States v. Kararias*, 7 Cir., 170 F. 2d 968; *Morrison v. Hunter, Warden*, 10 Cir., 161 F. 2d 723.

had been imposed. It was contended that some counts were invalid and that the remaining counts did not support the full seventeen year sentence. The court said:

"It is well settled that where a court has jurisdiction of the person and of the offense, the imposition of a sentence in excess of what the law permits does not render the authorized portion of the sentence a nullity, but leave open to attack on habeas corpus only such portion of the sentence as is excessive. * * *

In the civil procedure it is possible to remand the case to the trial court for resentencing⁸ or for correction of the sentence,⁹ but this is not practicable in the military system. This is well stated by the Court of Military Appeals in *United States v. Keith*, supra,¹⁰ wherein, in holding that such power was vested in the intermediate appellate court known as the Board of Review, it said:

"* * * Were the setting of the present case a civilian one, we would experience no difficulty in remanding to the court trying the accused for reconsideration of sentence or for retrial. In a military situation, however—and for reasons which must be apparent to all—this disposition of the matter is impracticable, if not impossible of achievement. In view of the lapse of time involved, it is highly probable that the court-martial which tried the accused, Keith, is no longer functioning as such. Through change of assignment, or otherwise, its members, indeed, may be scattered beyond recall. Even assuming the contrary in the present situation, the mentioned impossibility is certain to exist in many others involving an identical problem.

⁷ See also *McDonald v. Johnston*, Warden, 9 Cir., 149 F. 2d 768, 769; *Dimenza v. Johnston*, Warden, 9 Cir., 131 F. 2d 47.

⁸ *Moss v. United States*, 6 Cir., 132 F. 2d 873; cf. *United States v. Lynch*, 7 Cir., 159 F. 2d 198.

⁹ *McDonald v. Johnston*, Warden, 9 Cir., 149 F. 2d 768.

¹⁰ See also *United States v. Bigger*, 8 Court-Martial Reports 97.

Remand to the trial forum, for virtually any purpose in the military scene, is a difficult business, and remand from this Court simply an unworkable device. Fortunately it is also an unnecessary one. The Uniform Code of Military Justice, Article 66(c), 50 USC § 653, provides as follows:

'In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and *the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.* In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. (Emphasis supplied)'

Had the board of review, following its appearance before that body, disapproved the findings of guilty as to the misbehavior charge in the present case, it could have affirmed only 'such part or amount of the sentence, as it . . . (found) correct in . . . fact and . . . (determined), on the basis of the entire record, should be approved.' This Court is without statutory authority to act in such a manner. We may, however, correct a board of review in matters of law—and this we have done in the instant case with respect to board action on the charge specifying an instance of misbehavior. Accordingly, we now remand the case to The Judge Advocate General, United States Army, for reference to the board of review for the purpose of determining the adequacy of the sentence. See Uniform Code of Military Justice, Article 67(f), 50 USC § 674. * * *

[22] Sentencing is a post trial procedure, a stage beyond the actual trial, as to which the Army must make its own determination through its own tribunals. There is nothing abhorrent in the thought of separating the sentencing and the guilt finding functions. There have been suggestions

in relation to the civil courts that "once the judge has performed his duty as presiding officer at the trial and guilt is established the disposition would be turned over to a sentencing board * * *."

Recently the Honorable Simon E. Sobeloff, Solicitor General of the United States, in addressing the Section of Criminal Law of the American Bar Association, proposed that appellate courts be given the power to review sentences imposed.¹² Nor have appellate courts hesitated to reduce sentences in excess of the maximum. In *Spiro v. United States*, 2 Cir., 24 F. 2d 796, the court said:

" * * * The sentence is void merely for the excess. *Dodge v. United States*, 258 F. 300, 306 (C. C. A. 2), 7 A. L. R. 1510. In *Wechsler v. United States*, 158 F. 579 (C. C. A. 2), this court, under similar circumstances, reversed and remanded to the District Court, with instructions to enter a sentence in accordance with the statute. We see no reason, however, why we may not adopt the less cumbersome procedure of correcting the sentence by our own mandate, as was done in *Salazar v. United States*, 236 F. 541 (C. C. A. 8); *Priori v. United States*, 6 F. (2d) 575 (C. C. A. 6); *Goode v. United States*, 12 F. (2d) 542 (C. C. A. 8); *Jackson v. United States*, 102 F. 473 (C. C. A. 9)."

[23] The Supreme Court in *Bozza v. United States*, 30 U.S. 160, 166, aptly said:

" * * * This Court has rejected the 'doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogether, because the court committed an error in passing the sentence.' In re Bonner, supra at 260. The Constitution does not require that sentencing should be a game in which a wrong

¹¹ Developing Systematic Sentencing Procedures by Judge William J. Campbell in September 1954 issue of the Federal Probation Journal of the Administrative Office of the United States Courts, Vol. 18, No. 3, at page 7. Judge Campbell does not favor this course.

¹² *American Bar Association Journal*, January 1955, Vol. 41, No. 1, Page 13.

move by the judge means immunity for the prisoner. See *King v. United States*, 69 App. D.C. 10, 15, 98 F. 2d 291, 296. * * * ¹³

Since a court-martial is generally beyond recall after the trial, certainly the power to correct a sentence in a situation such as we now have before us, must lie somewhere within the military system and the Court of Military Appeals, the highest court in the military system,¹³ has made the determination where that power lies. It does not involve a lack of jurisdiction or a want of power within the military system which would justify this Court in interfering therein. Within the military system the action of the board of review was proper and within its authority.

In *DeCoster v. Madigan*, 7 Cir., 223 F. 2d 906, in a habeas corpus proceeding involving a defendant involved in the same crime with the petitioner, the court arrived at a different conclusion. Its reasoning is predicated upon the proposition that "Imposition of sentence by the proper authority is an essential step in administration of criminal [24] justice." But the fallacy lies in attempting to determine for the army what constitutes such proper authority within the military system instead of leaving that determination of a procedural matter to the Court of Military Appeals. This Court is in accord with the conclusion arrived at by Judge Finnegan in his dissenting opinion. What effect, in the light of the Supreme Court's opinion in *Toth v. Quarles*, supra, the dishonorable discharge would have upon an attempt to resentence on the theory of the majority opinion that the original sentence was void, need not be decided here.

The application for Writ of Habeas Corpus will be denied and the Rule to Show Cause discharged.

FREDERICK V. FOLLMER,
United States District Judge.

November 25, 1955.

¹³ See also *Coy v. Johnston*, Warden, 9 Cir. 136 F. 2d 818, 820, cert. den. 320 U.S. 788, reh. den. 320 U.S. 815; *King v. United States*, App. D.C. 98 F. 2d 291, 296; *McDowell v. Swope*, supra.

¹⁴ *Burns v. Wilson*, 346 U.S. 137, 141, Note 7.

[25] In United States District Court

ORDER DISCHARGING WRIT OF HABEAS CORPUS—November 25,
1955

And now to wit., November 25, 1955, for the reasons set forth in the foregoing Opinion, the petition of Chester E. Jackson for Writ of Habeas Corpus is accordingly denied, and the Rule to Show Cause issued thereon is discharged.

FREDERICK V. FOLLMER,
United States District Judge.

[25a] [File endorsement omitted.]

[26] In the United States Court of Appeals for the Third
Circuit

[Title omitted]

STIPULATION OF COUNSEL FOR SUBSTITUTION OF A PARTY AND
APPROVAL THEREOF—May 7, 1956

Counsel for Appellant, Urban P. Van Susteren, and counsel for Appellee, J. Julius Levy, United States Attorney in and for the Middle District of Pennsylvania, hereby stipulate and agree, subject to the approval of the Court, to the substitution of John C. Taylor for George W. Humphrey, Defendant-Appellee; the latter party having been replaced as Warden of the United States Penitentiary, Lewisburg, Pennsylvania, by John C. Taylor, as Acting Warden.

(S.) URBAN P. VAN SUSTEREN,
Counsel for Appellant.

(S.) J. JULIUS LEVY,
United States Attorney.

April —, 1956.

Approved: May 7, 1956, Goodrich J.

[27] In United States Court of Appeals for the Third Circuit

No. 11,808

CHESTER E. JACKSON, APPELLANT

v.

JOHN C. TAYLOR, ACTING WARDEN

Appeal from the United States District Court, for the Middle District of Pennsylvania

Argued April 17, 1956

Before GOODRICH, KALODNER and HASTIE, *Circuit Judges*.

OPINION OF THE COURT—Filed May 31, 1956

By HASTIE, *Circuit Judge*.

A general court-martial, convened in Korea on June 8, 1951, found the petitioner, a soldier in the United States Army, and two other soldiers guilty of the premeditated murder of a Korean woman and of an attempt to rape her somewhat earlier the same day. Under military law either death or life imprisonment is the mandatory punishment for premeditated murder. Attempted rape is punishable by imprisonment not to exceed 20 years. See Table of Maximum Punishments, Manual for Courts-Martial, U. S. 1951, 219, 221. Each of the accused soldiers was sentenced to life imprisonment. The convening authority approved this action, but a board of review, while sustaining the conviction [28] of attempted rape, found the conviction of murder unwarranted and set it aside. With reference to the sentence imposed by the court-martial the board of review ruled as follows:

"By reason of the . . . action herein taken as to the murder specification, the sentences [imposed upon the three soldiers] of confinement at hard labor for life are improper. Under the circumstances in this case, a sentence of dishonorable discharge, total forfeiture and confinement at hard labor for twenty (20) years is appropriate for conviction of an attempt to commit rape."

Procedurally, the board undertook to modify and reduce the life sentence to a sentence of imprisonment for 20 years and ordered the sentence affirmed as thus modified. *United States v. Fowler, et al.*, 1952, 2 C.M.R. 336. The United States Court of Military Appeals denied a petition for further review. 1952; 1 U.S.C.M.A. 713. It is conceded that no question was raised before that tribunal as to the authority of the board of review to modify the sentence in the manner described above.

To serve this 20 year term petitioner was committed to a federal penitentiary in the Middle District of Pennsylvania. While there confined he has instituted this habeas corpus proceeding in the district court challenging the validity of the modified sentence.

Petitioner does not claim any deprivation of constitutional right. He contends only that under military law the board of review was without authority to change the life sentence to one of 20 years' imprisonment, instead of ordering either a new trial or his release. One of the petitioner's confederates, who had been convicted with him and whose sentence had been reviewed and modified at the same time and in the same way, but who was imprisoned in Indiana, has already successfully urged this contention in the Seventh Circuit. *DeCoster v. Madigan*, 7 Cir. 1955, 223 F.2d 906. However, in the present case, the district court was [29] not persuaded by the claim of invalid sentencing and, accordingly, denied the petition. *Jackson v. Humphrey*, 1955, 135 F. Supp. 776. This appeal followed.

As stated above, the question of the reviewing board's resentencing power under military law, now raised by petition for habeas corpus, was not raised by the petitioner before the Court of Military Appeals when he asked that court to review the action of the board of review. Therefore, the government argues that the issue should not be considered now for the first time on habeas corpus. Cf. *Burns v. Wilson*, 1953, 346 U.S. 137. But, believing the district court reached the correct conclusion on the merits, we shall not decide whether the same result could properly have been reached by denying the propriety of habeas corpus as a remedy in the circumstances in this case. Compare the reasoning of the concurring opinion in *United States ex rel. Aul v. Warden*, 3 Cir. 1951, 187 F.2d 615, 620.

The appropriate procedures on review and the powers of the reviewing authorities in this case are prescribed by the Uniform Code of Military Justice, 50 U.S.C., c. 22, which became effective on May 13, 1951. Article 66(c) of that code confers and defines the power of a board of review as follows:

"In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. . . ." 64 Stat. 128, 50 U.S.C. § 653.

Here, the board of review, in changing the petitioner's sentence from life imprisonment to 20 years, thought it was properly exercising the power Article 66 (c) gives it to ". . . affirm . . . such part or amount of the sentence as it finds correct. . . ." Opposing this view, petitioner [30] argues that the 20 year term approved by the reviewing authority is not a "part or amount of the sentence" imposed by the court-martial, but rather is a distinct original sentence and, therefore, beyond the power of the reviewing board.

To resolve this dispute we must discover for what offense or offenses the court-martial imposed the life sentence. Unquestionably, the accused was found guilty of two distinct offenses. And thereafter, in imposing a single sentence, the court did not state the relation of that sentence to either or both of the offenses. However, it is the normal, traditional and well understood practice in the administration of military justice that "there shall be but a single sentence covering all the convictions on all the charges and specifications upon which the accused is found guilty, however separate and distinct may be the different offenses found, and however different may be the punishments called for by the offenses." 1 Winthrop, Military Law, 2d ed. § 615. And see *Carter v. McClanghry*, 1901, 183 U.S. 365, 393; *United States v. Keith*, 1952, 1 U.S.C.M.A. 444, 448. And at the time of this trial that usage was embodied in

the authoritative teaching of Manual for Courts-Martial that "[i]t is the duty of each member [of the court] to vote for a proper sentence for the offense or offenses of which the accused has been found guilty. . . ." Manual for Courts-Martial, U.S. 1951, Art. 76 b (2). Indeed, this gross sentence practice is so firmly established that it seems to be followed routinely without recital that the court is doing so.

But special circumstances are pointed out here to lend color to a claim that this case is different. First, the law officer followed the normal practice of advising the court after verdict and before sentence as to the maximum punishment it might impose. See Manual for Courts-Martial, U.S. 1951, Art. 76 b (1). In this connection he told the court that, the prisoner having been found guilty of murder, the court's sentencing power was limited to two alternatives, a death sentence or a sentence of life imprisonment. He said nothing about punishment for attempted rape. So, petitioner reasons, punishment for attempted rape was not in fact considered by the court and was not in fact or law a component of its sentence. Second, petitioner attempts to reinforce this position by arguing that the sentence imposed is on its face the minimum sentence for premeditated murder, and that this establishes as a matter of arithmetic that no punishment was imposed for attempted rape.

Ingenuous though this line of argument is, and persuasive though it has been to a majority of the division which decided *DeCoster v. Madigan*, *supra*, in another circuit, we reject it. To begin with, it was not possible for the court which found the petitioner guilty of both premeditated murder and attempted rape to order imprisonment for either a long or a shorter period than it did. For under military law the death sentence is the only lawful alternative to life imprisonment, once a defendant has been found guilty of premeditated murder, whether alone or in addition to some other crime. Thus, the failure of the law officer to say anything to the court about the maximum punishment for attempted rape suggests nothing more than that he understood how pointless such an explanation would have been in the posture of this case. Moreover, the arithmetical

argument that a sentence for two offenses must be longer than the minimum sentence required for one of them ignores both the practical difficulty of imprisoning for life plus any number of years and the absence of provision for any such oddity in the rules which control military sentencing. See Manual for Courts-Martial, U.S. 1951, Art. 76 b (4) and Appendix 13. We conclude that in the circumstances of this case the court-martial imposed and military law reasonably recognizes the single sentence of life imprisonment as punishment for both murder and attempted rape. Cf. *United States v. Gephart*, 1952, 4 C.M.R. 306, petition for review denied, 2 U.S.C.M.A. 670. And see note [32] 1956, 65 YALE L.J. 413. The board of review reduced this sentence for murder and attempted rape to the lesser punishment which it deemed appropriate for the crime of attempted rape alone.

The only other basis suggested for this challenge to the validity of the modified sentence is that in reducing the original sentence to 20 years, the maximum for attempted rape, the board of review may well have exceeded the punishment which the court-martial would have imposed for that offense alone.¹ It is, of course, conjectural what sentence the court-martial would have imposed for attempted rape in the absence of the murder conviction. But the power to resentence, for either a lesser offense or a smaller number of offenses than established by the verdict of the court-martial, without any indication of what the trial tribunal would have done in similar circumstances, is a characteristic feature of military review of criminal convictions.² Presently, authority for that practice is to be

¹ Upon this basis, we are informed, the District Court for the Northern District of Georgia, in an unreported case, *Fowler v. Hardwick*, decided Dec. 27, 1955, invalidated the sentence of the third soldier involved in this crime, saying in its order: "This court cannot assume that, had he not been sentenced for murder however, his sentence for attempted rape would have been twenty years."

² But the resentence must not be arbitrarily severe, even though within the statutory maximum. *United States v. Voorhees*, 1954, 4 U.S.C.M.A. 5091.

found in the already quoted provision of Article 66 (c) of the Uniform Code of Military Justice authorizing a board of review to "... affirm ... such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."

We think a grant of power in such terms clearly contemplates the exercise of independent judgment by the reviewing authority as to the appropriate sentence on modified findings, subject only to the statutory prohibition against increasing the original gross sentence. Certainly, this construction comports with military understanding and procedure in uncounted numbers of cases. A few, recently [33] reported, are cited in the margin.³ Such reasonable

³ a. Cases of sentence reduction after less than all of the trial findings of guilty have been approved. *United States v. Beninate*, 1954, 4 U.S.C.M.A. 98 (originally 3 years for desertion and 3 unauthorized absences, reduced on review to legal maximum for the unauthorized absences alone); *United States v. Wellman*, 1954, U.S.C.M.A. 348, (originally 1 year for desertion and failure to obey an order, reduced on review to 6 months for failure to obey an order alone); *United States v. Blau*, 1954, 5 U.S.C.M.A. 232 (originally 3 years for 14 specifications of false official statements and violations of regulations, reduced to 1 year by convening authority on elimination of 8 violations, further reduced to 9 months by board of review on elimination of yet another violation).

b. Cases of sentence reduction where guilt of lesser included offense is substituted for guilt of offense originally charged. *United States v. Bigger*, 1953, 2 U.S.C.M.A. 297, (premeditated murder verdict changed to unpremeditated murder and sentence reduced from death to life imprisonment, the maximum for the included offense); *United States v. Walker*, 1953, 3 U.S.C.M.A. 355 (10 years for unpremeditated murder, reduced to 2 years for involuntary manslaughter); *United States v. Smith*, 1954, 4 U.S.C.M.A. 369 (1 year for larceny from mail, reduced to 6 months for petit larceny).

c. Cases where original sentence affirmed despite vacation of some of the findings of guilty. *United States v.*

reading and administration of the legislatively approved military code should not be disturbed by the civil courts.

The judgment will be affirmed.

[34] In United States Court of Appeals for the Third Circuit

No. 11,808

CHESTER E. JACKSON, APPELLANT

vs.

JOHN C. TAYLOR, ACTING WARDEN

On Appeal from the United States District Court for the Middle District of Pennsylvania

Present: GOODRICH, KALODNER and HASTIE, Circuit Judges.

JUDGMENT—May 31, 1956

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration, whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IRA O. CRESKOFF,

Clerk.

May 31, 1956.

[File endorsement omitted.]

Long, 1952, 2 U.S.C.M.A. 45, (death sentence for two offenses of rape, premeditated murder and two assaults with intent to do bodily harm with a dangerous weapon; one assault conviction set aside and premeditated murder reduced to unpremeditated murder but death sentence affirmed); *United States v. Eagleson*, 1954, 3 U.S.C.M.A. 685, (sentence of dismissal and \$50. fine for reckless operation of a motor vehicle and leaving the scene of an accident; reckless operation charge set aside but sentence approved).

[35] ORDER STAYING ISSUANCE OF MANDATE (omitted in Printing)

[35a] Clerk's Certificate to foregoing transcript omitted in printing.

[36] SUPREME COURT OF THE UNITED STATES—OCTOBER TERM, 1956

No. 234 Misc.

[Title omitted.]

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

ORDER ALLOWING CERTIORARI—December 10, 1956

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the gross sentence question. The case is transferred to the appellate docket as No. 619 and placed on the summary calendar.

is not by the Judge Advocate General or the Board of Review deemed necessary, the Judge Advocate General shall transmit the holding to the convening authority, and such holding shall be deemed final and conclusive.

(2) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, but modification of the findings of guilty or the sentence is by the Judge Advocate General or the Board of Review deemed necessary to the ends of justice, the holding and the record of trial shall be to the ends of justice, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

(3) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General concurs in such holding, the findings and sentence shall thereby be vacated in whole or in part in accord with such holding, and the record shall be transmitted by the Judge Advocate General to the convening authority for rehearing or such other action as may be appropriate.

(4) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

f. Appellate action in other cases:—Every record of trial by general court-martial the appellate review of which is not otherwise provided for by this article shall be examined in the Office of the Judge Advocate General and if found

legally insufficient to support the findings of guilty and sentence, in whole or in part, shall be transmitted to the Board of Review for appropriate action in accord with paragraph e of this article.

g. Weighing evidence.—In the appellate review of records of trials by court-martial as provided in these articles the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact.

h. Finality of court-martial judgments.—The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 or 49, the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53.

50 U.S.C. 649 (Article of War 62) 64 Stat. 127

ART. 62. Reconsideration and revision.

a. If a specification before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 619

CHESTER E. JACKSON,

Petitioner,

vs.

JOHN C. TAYLOR, ACTING WARDEN,

Respondent

BRIEF OF PETITIONER

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INDEX

SUBJECT INDEX

Petitioner's Brief	Page 1
Opinions Below	1
Jurisdiction	1
Statutes and Regulations Involved	1
Questions for Review	13
Statement of the Case	13
Summary of Argument	15
Argument	17
Conclusion	33

TABLE OF CASES CITED

<i>Carey v. Donohue</i> , 240 U.S. 430, 60 L. ed. 726, 36 S. Ct. 386	27
<i>Carter v. McClaughry</i> , 183 U.S. 365, 22 S. Ct. 181, 46 L. ed. 236	23
<i>Claassen v. United States</i> , 142 U.S. 140, 12 S. Ct. 169, 35 L. ed. 966	23
<i>DeCoster v. Madigan</i> , 223 F. 2d 906	19
<i>Evans v. United States</i> , 153 U.S. 608, 14 S. Ct. 939, 38 L. ed. 839	23
<i>Helnering v. Credit Alliance Corp.</i> , 316 U.S. 107, 86 L. ed. 1307, 62 S. Ct. 989	26
<i>Hiscock v. Mertens</i> , 205 U.S. 202, 27 S. Ct. 488, 51 L. ed. 771	20
<i>Keppell v. Tiffin Savings Bank</i> , 197 U.S. 356, 25 S. Ct. 443, 49 L. ed. 790	20
<i>Kring v. Missouri</i> , 107 U.S. 211, 26 L. ed. 506, 2 S. Ct. 443	31
<i>Pinkerton v. United States</i> , 328 U.S. 640, 66 S. Ct. 1180, 90 L. ed. 1489	23
<i>Re Medley</i> , 134 U.S. 160, 33 L. ed. 835, 10 S. Ct. 384	30
<i>Runkle v. United States</i> , 122 U.S. 543, 7 S. Ct. 1141, 30 L. ed. 1167	17

	Page
<i>St. Louis, I.M.S.R. Co. v. Taylor</i> , 210 U.S. 281, 52 L. ed. 1061, 28 S. Ct. 616	27
<i>St. Louis & S.F.R. Co. v. Delk</i> , (C.C.A. 6th), 158 F. 931 (Reversed on other grounds) 220 U.S. 580, 55 L. ed. 590, 31 S. Ct. 617	26
<i>United States v. Bobby L. Keith</i> , 1 U.S.C.M.A. 442, 4 C.M.R. 34	25
<i>United States v. Lexington Mill & Elevator Co.</i> , 232 U.S. 399, 34 S. Ct. 337, 58 L. ed. 658	20
<i>United States v. Hall</i> , 2 Wash. (CC) 366	32

STATUTES CITED

Article of War 50½ (10 U.S.C. 1522)	3, 6, 21
Article of War 50 (10 U.S.C. 1522)	3, 6, 21
Article 62, Uniform Code of Military Justice	11
Article 63, Uniform Code of Military Justice	12
Article 66 U.C.M.J. (50 U.S.C. 653)	1, 13
Manual for Courts-Martial	30
Senate Committee Report, 1st Session, 81st Congress	21
House Committee Report, 1st Session, 81st Congress	21
U. S. Constitution, Article 1, Section 9	13

TEXTBOOKS

11 American Jurisprudence 1185, (Const. Law, Sec. 357)	32
--	----

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 619

CHESTER E. JACKSON,

vs.

Petitioner,

JOHN C. TAYLOR, ACTING WARDEN,

Respondent

BRIEF OF PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported at 234 F. 2d 611. The opinion of the District Court is reported at 135 F. Supp. 776.

Jurisdiction

The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1). The judgment of the Court of Appeals was entered on May 31, 1956. The petition for a writ of certiorari was filed on August 21, 1956.

Statutes and Regulations Involved

50 U.S.C. 653 (Article of War 66) 64 Stat. 128

ART. 66. Review by the board of review.

(a) The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review, each composed of not less than three officers or

civilians, each of whom shall be a member of the bar of a Federal court or of the highest court of a State of the United States.

(b) The Judge Advocate General shall refer to a board of review the record in every case of trial by court-martial in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more.

(c) In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the board of review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President or the Secretary of the Department or the Court of Military Appeals, instruct the convening authority to take action in accordance with the decision of the board of review. If the board of review has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocate General of the armed forces shall prescribe uniform rules of procedure for proceedings in and before boards of review and shall meet periodically

to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by the boards of review.

10 U.S.C. 1522 (Article of War 50½) 41 Stat. 799

ART. 50½. Review: Rehearing.—The Judge Advocate General shall constitute, in his office, a board of review consisting of not less than three officers of the Judge Advocate General's Department.

Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of article 46, article 48, or article 51 is submitted to the President, such record shall be examined by the board of review. The board shall submit its opinion, in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President.

Except as herein provided, no authority shall order the execution of any other sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, with the approval of the Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence; except that the proper reviewing or confirming authority may upon his approval of a sentence involving dishonorable discharge or confinement in a penitentiary order its execution if it is based solely upon findings of guilty of a charge or charges and a specification or specifications to which the accused has pleaded guilty. When the board of review, with the approval of the Judge Advocate General, holds the record in a case in which the order of execution has been withheld

under the provisions of this paragraph legally sufficient to support the findings and sentence, the Judge Advocate General shall so advise the reviewing or confirming authority from whom the record was received, who may thereupon order the execution of the sentence. When in a case in which the order of execution has been withheld under the provisions of this paragraph, the board of review holds the record of trial legally insufficient to support the findings or sentence, either in whole or in part, or that errors of law have been committed injuriously affecting the substantial rights of the accused, and the Judge Advocate General concurs in such holding of the board of review, such findings and sentence shall be vacated in whole or in part in accord with such holding and the recommendations of the Judge Advocate General thereon, and the record shall be transmitted through the proper channels to the convening authority for a rehearing or such other action as may be proper. In the event that the Judge Advocate General shall not concur in the holding of the board of review, the Judge Advocate General shall forward all the papers in the case, including the opinion of the board of review and his own dissent therefrom, directly to the Secretary of War for the action of the President, who may confirm the action of the reviewing authority or confirming authority below, in whole or in part, with or without remission, mitigation, or commutation, or may disapprove. In whole or in part, any finding of guilty, and may disapprove or vacate the sentence, in whole or in part.

When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a court composed of officers not members of the court which first heard the case. Upon such rehearing the

accused shall not be tried for any offense of which he was found not guilty by the first court, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding: *Provided*, That such rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the board of review approved by the Judge Advocate General holding the record of trial legally insufficient to support the findings or sentence or that errors of law have been committed injuriously affecting the substantial rights of the accused, unless in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authority. After any such rehearing had on the order of the President, the record of trial shall, after examination by the board of review, be transmitted by the Judge Advocate General, with the board's opinion and his recommendations, directly to the Secretary of War for the action of the President.

Every record of trial by general court-martial examination of which by the board of review is not hereinbefore in this article provided for, shall nevertheless be examined in the Judge Advocate General's Office; and if found legally insufficient to support the findings and sentence, in whole or in part, shall, in writing, submit its opinion to the Judge Advocate General, who shall transmit the record and the board's opinion, with his recommendation, directly to the Secretary of War for the action of the President. In any such case the President may approve, disapprove or vacate, in whole or in part, any findings of guilty, or confirm, mitigate, commute, remit, or vacate any sentence, in whole or in

part, and direct the execution of the sentence as confirmed or modified, and he may restore the accused to all rights affected by the findings and sentence, or part thereof, held to be invalid; and the President's necessary orders to this end shall be binding upon all departments and officers of the Government.

Whenever necessary, the Judge Advocate General may constitute two or more boards of review in his office, with equal powers and duties.

Whenever the President deems such action necessary, he may direct the Judge Advocate General to establish a branch of his office, under an Assistant Judge Advocate General, with any distant command, and to establish in such branch office a board of review, or more than one. Such Assistant Judge Advocate General and such board or boards of review shall be empowered to perform for that command, under the general supervision of the Judge Advocate General, the duties which the Judge Advocate General and the board or boards of review in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President.

10 U.S.C. 1522 (Article of War 50) 62 Stat. 637

ART. 50. Appellate Review.—

a. Board of review; judicial council.—The Judge Advocate General shall constitute, in his office, a Board of Review composed of not less than three officers of the Judge Advocate General's Department. He shall also constitute, in his office, a Judicial Council composed of three general officers of the Judge Advocate General's Department: *Provided*, That the Judge Advocate General may, under exigent circumstances, detail as members of the Judicial Council, for periods not in excess of sixty days, officers of the Judge

Advocate General's Department of grades below that of general officer.

b. Additional boards of review and judicial councils.—Whenever necessary, the Judge Advocate General may constitute two or more Boards of Review and Judicial Councils in his office, with equal powers and duties, composed as provided in the first paragraph of this article.

c. Branch offices.—Whenever the President deems such action necessary, he may direct The Judge Advocate General to establish a branch office, under an Assistant Judge Advocate General who shall be a general officer of The Judge Advocate General's Department, with any distant command, and to establish in such branch office one or more Boards of Review and Judicial Councils composed as provided in the first paragraph of this article. Such Assistant Judge Advocate General and such Board of Review and Judicial Council shall be empowered to perform for that command under the general supervision of The Judge Advocate General, the duties which The Judge Advocate General and the Board of Review and Judicial Council in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President: *Provided*, That the power of mitigation and remission shall not be exercised by such Assistant Judge Advocate General or by agencies in his office, but any case in which such action is deemed desirable shall be forwarded to The Judge Advocate General with appropriate recommendations.

d. Action by board of review when approval by president or confirming action is required.—Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President or confirmation by any other confirming authority is submitted to the President of such other confirming authority, as the case

may be, it shall be examined by the Board of Review which shall take action as follows:

(1) In any case requiring action by the President, the Board of Review shall submit its opinion in writing, though the Judicial Council which shall also submit its opinion in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the Board's and Council's opinions, with his recommendations, directly to the Secretary of the Department of the Army for the action of the President: *Provided*, That the Judicial Council, with the concurrence of the Judge Advocate General shall have powers in respect to holdings of legal insufficiency equal to the powers vested in the Board of Review by subparagraph (3) of this paragraph.

(2) In any case requiring confirming action by the Judicial Council with or without the concurrence of the Judge Advocate General, when the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence it shall submit its opinion in writing to the Judicial Council for appropriate action.

(3) When the Board of Review is of the opinion that the record of trial in any case requiring confirming action by the President or, confirming action by the Judicial Council is legally insufficient to support the findings of guilty and sentence, or the sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, it shall submit its holding to the Judge Advocate General and when the Judge Advocate General concurs in such holding, such findings and sentence shall thereby be vacated in accord with such holding and the record shall be transmitted by the Judge Advocate General

to the appropriate convening authority for a rehearing or such other action as may be proper.

(4) In any case requiring confirming action by the President or confirming action by the Judicial Council in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, or the sentence, and the Judge Advocate General shall not concur in the holding of the Board of Review the holding and the record of trial shall be transmitted to the Judicial Council for confirming action or for other appropriate action in a case in which confirmation of the sentence by the President is required under article 48a.

e. Action by board of review in cases involving dishonorable or bad-conduct discharges or confinement in penitentiary.—No authority shall order the execution of any sentence of a court-martial involving dishonorable discharge not suspended, bad-conduct discharge not suspended, or confinement in a penitentiary unless and until the appellate review required by this article shall have been completed and unless and until any confirming action required shall have been completed. Every record of trial by general or special court-martial involving a sentence to dishonorable discharge or bad-conduct discharge, whether such discharges be suspended or not suspended, and every record of trial by general court-martial involving a sentence to confinement in a penitentiary, other than records of trial examination of which is required by paragraph d of this article, shall be examined by the Board of Review which shall take action as follows:

(1) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, and confirming action

-b. Where there is an apparent error or omission in the record or where the record shows improper or inconsistent action by a court-martial with respect to a finding or sentence which can be rectified without material prejudice to the substantial rights of the accused, the convening authority may return the record to the court for appropriate action. In no case, however, may the record be returned—

(1) for reconsideration of a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty; or

(2) for reconsideration of a finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of this code; or

(3) for increasing the severity of the sentence unless the sentence prescribed for the offense is mandatory.

50 U.S.C. 650 (Article of War 63) 64 Stat. 127

ART. 63. Rehearings.

(a) If the convening authority disapproves the findings and sentence of a court-martial he may, except where there is lack of sufficient evidence in the record to support the findings, order a rehearing in which case he shall state the reasons for disapproval. If he disapproves the findings and sentence and does not order a rehearing, he shall dismiss the charges.

(b) Every rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be imposed unless the sentence is based upon

a finding of guilty of an offense not considered upon the merits in the original proceedings or unless the sentence prescribed for the offense is mandatory.

Questions for Review

1. Where a court martial convicted a soldier on two separate charges, murder and attempted rape, and imposed one lump sentence, life imprisonment, for both charges and the Board of Review set aside the murder conviction for lack of evidence but affirmed the conviction for attempted rape, was the Board of Review thereupon authorized to make its own initial determination of the proper sentence for attempted rape and allot twenty years of the life sentence for that charge (the maximum) or was it required to order a rehearing?

2. Did Article of War 50 (10 U.S.C. 1521) which was in effect at the time the crime was committed, guarantee to a soldier a new trial under the facts and circumstances of this case and, if so, was there a violation of the soldier's rights under Section 9 of Article One of the United States Constitution (ex post facto) in applying Article 66 of the U. S. Code of Military Justice (50 U.S.C. 653) to the appellant procedures of his case where such latter article is interpreted as not guaranteeing a new trial?

Statement of the Case

There is no dispute about any of the material facts of the case. The petitioner, then a soldier in the U. S. Army and stationed in Korea, was brought before a general court martial at Haengsong, Korea, on June 8, 1951, charged with the murder of "an adult Korean female person whose name is unknown, a human being, by shooting her in the head with a pistol or carbine." He was also charged with "forcibly and feloniously, against her will, having carnal knowl-

edge of an adult Korean female person whose name is unknown."

Two other soldiers, Carl Andrew De Coster and Harriel L. Fowler, were tried with him, charged in identical manner. At the conclusion of the trial, June 9, 1951, the Court found all three of the defendants guilty of murder and not guilty of rape, but guilty of attempted rape. After the findings of guilty were announced the Law Officer instructed the Court that the penalty on the conviction of murder must be either death or life imprisonment. After deliberating for twenty minutes the court announced a life imprisonment sentence for each of the defendants.

The Law Officer did not at any time instruct the court on the subject of the maximum or minimum sentence for attempted rape nor did the court fix any separate penalty therefor.

In due course the convictions and the sentences of all three soldiers were reviewed by the Board of Review pursuant to Article 66, U.S.C.M.J. That Board, on June 15, 1952, announced its decision as follows:

"In the absence of adequate proof linking the acts of the accused with the death of the victim of the attempted rape, we conclude that the findings of guilty of murder (Specification 1) are incorrect in law and fact and should be set aside. (MCM, 1949, subper. 179a., p. 232, 'Proof')"

The Board did not order a rehearing for the purpose of imposing sentences on the remaining convictions but instead, reduced the life sentence to the legal maximum for attempted rape. That maximum was twenty (20) years.

On June 2, 1952, the United States Court of Military Appeals declined to consider plaintiff's Petition for Grant of Review. *United States v. Fowler, De Coster and Jackson*,

1 USCMA 713. Jackson, your petitioner here, was eventually transported to the U. S. Penitentiary at Lewisburg, Pennsylvania for service of his sentence and he is now confined there.

In March, 1954, petitioner instituted habeas corpus proceedings before the United States District Court for the Middle District of Pennsylvania directed against the Warden of the Penitentiary at Lewisburg. That action was based upon the contention that the Board of Review exceeded its authority when it fixed a twenty year penalty for attempted rape. The writ was denied. *Jackson v. Humphrey*, 135 Fed. Supp. (November 25, 1955).

The United States Court of Appeals for the Third Circuit rendered its opinion and judgment on May 31, 1956, affirming the judgment of the District Court 234 F.2d, 611. Certiorari has been granted for a review of that decision.

Summary of Argument

The Board of Review, being an inferior court of limited jurisdiction, has only those powers given to it by statute.

Article 66 of the Uniform Code of Military Justice (50 U.S.C. 653) is the statute which creates the Board and defines its powers. Authority to make an initial determination of a sentence is not given by express language in that or any other statute even though apt words and phrases could easily have been found to confer such power. Nor does the Code give the Board broad supervisory powers from which such authority might be inferred. The language in its ordinary meaning indicates that Congress intended the Board to have the usual powers of appellate courts in addition to clemency powers, but nothing more.

Two antecedent statutes, in pari materia, dating back to 1920, clearly require the Board to send the record back for

rehearing in cases of this kind and so the rule, that long established principles will not be overturned without express language or unmistakable implication should be applied here. Imposition of sentences by appellate courts is repugnant to American precedents. Neither the House nor the Senate Committee Report implies such authority. Federal courts do not have it. The Lord Mansfield Doctrine as recited by the *Claassen* case does not give such authority except under facts clearly distinguishable from the present case.

An interpretation of Art. 66 which gives the Board power to make an initial, and at the same time final, determination of a sentence is out of harmony with other provisions of the Code and is in opposition to the manifest intention of Congress to establish strong safeguards against unnecessarily harsh penalties. It would eliminate two of the three routine steps in proper sentence procedure which are mandatory for all other cases.

The statute is ambiguous. Unjust and unfair interpretations will never be given to resolve an ambiguity. Where a soldier has been erroneously or wrongfully convicted of murder and sentenced therefor to life imprisonment it is not fair or just that an appellate tribunal upon discovering the error should have authority to set aside only such part of the sentence as exceeds the maximum for some other crime on which he stands convicted. That is especially true where there is nothing to show what sentence a court-martial would have imposed.

The crime was committed prior to the effective date of the statute used to govern the appellate procedures of this case. An interpretation of Art. 66 which denies to petitioner two of the routine steps in sentence procedure and two chances for a lesser sentence which were guaranteed by the law in

effect at the time the offense was committed, is a violation of the ex post facto provision of the U. S. Constitution because the statute, so interpreted, alters the situation of the accused to his disadvantage and affects him in a harsh and arbitrary manner.

ARGUMENT

The Board of Review Is a Court of Special and Limited Jurisdiction and Has Only Such Powers as Are Given to It By the Statute Which Created It.

The Board of Review is a unit or component of the Judge Advocate General's Office. It was created by Article 66 of the Uniform Code of Military Justice (50 U.S.C.A. 653) and its powers and duties are as defined therein. Its rules of procedure are prescribed by Executive Order #10214 promulgated May 5, 1950, pursuant to Article of War 36. The Order establishes procedure for all phases and all steps of military justice and is published in book form with the title, *Manual for Courts-Martial*. (M.C.M.)

In *Runkle v. United States*, 122 U.S. 543, 7 S. Ct. 1141, 30 L. ed. 1167 this Court said that a court martial is:

"... one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally. To give effect to its sentences it must appear affirmatively and unequivocally that ... all the statutory regulations governing its proceedings have been complied with and that its sentence was conformable to law."

It is conceded that, except for ex post facto considerations, Congress has Constitutional authority to grant the Board of Review the power in question, and so the issue is resolved to one of proper interpretation of the statute applicable.

Authority to Make Initial Determination of a Sentence Under the Facts of This Case Cannot Be Found Within the Language Employed.

So much of Art. 66 as is pertinent to this brief is set forth below.

“(b) The Judge Advocate General shall refer to a Board of Review the record in every case of trial by court martial in which the sentence, as approved, . . . extends to . . . confinement for one year or more.”

“(c) In a case referred to it the Board of Review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it shall have authority to weigh the evidence, judge the credibility of witnesses and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.”

“(d) If the Board of Review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.”

“(e) The Judge Advocate General shall, . . . instruct the convening authority to take action in accordance with the decision of the Board of Review. If the Board of Review has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.”

Before analyzing the language of the statute to determine whether the Board exceeded its powers it is necessary to have in mind the peculiar facts of this case. The court martial convicted petitioner on two separate charges and specifications, murder and attempted rape. Before the Court started its deliberations on the sentence to be imposed, it was advised by the law officer that the sentence had to be either death or life imprisonment. The Court announced one single sentence, life imprisonment. There was no separate sentence for the attempted rape nor was anything said to indicate what part or amount of the sentence was assessed on the conviction for attempted rape. The convictions on both counts, and the sentence, were thereafter approved by the convening authority in routine manner and the record was referred to the Board of Review. The Board found that there was nothing in the record to establish a connection between the actions of the three defendants and the death of the woman and accordingly set aside the murder conviction. It did not, however, set aside the entire sentence and return the record to the convening authority for a rehearing. Instead, it set aside only so much of the sentence as exceeded the maximum for attempted rape—twenty years—and affirmed the sentence as modified.

The true essence of the Board's action is described by the U. S. C. A. for the Seventh Circuit in the case of *DeCoster v. Madigan*, 223 F. 2d 906 (a companion case to this one) that Court said: (p. 909)

"We are unable to discern how this action can fairly be characterized as other than an original imposition of sentence by the Board. The court martial imposed no such sentence, yet after the review of this case plaintiff was confronted with a twenty year term."

If it is contended that the language of the statute expressly conferred the power in question then such language must be found in the following sentence from paragraph c of Art. 66.

“(c) . . . It (the Board of Review) shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.”

There is no other language, either in the Uniform Code of Military Justice or in the Executive Order which gives the Board authority to allot a portion of the sentence against any one of the convictions.

The first reaction to the phraseology of that paragraph is that if Congress intended the interpretation given to it by the Board of Review it could easily have found apt words or phrases to express it. This Court has frequently applied that test. *U. S. v. Lexington Mill & Elevator Co.*, 232 U. S. 399, 58 L. ed. 658, 34 S. Ct. 337; *Hiscock v. Mertens*, 205 U. S. 202, 51 L. ed. 771, 27 S. Ct. 488; *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 49 L. ed. 790, 25 S. Ct. 443. How clear and unmistakable would have been the intention of Congress if it had added to the paragraph this sentence: “If it affirms only a part of the findings it shall impose an appropriate sentence for the convictions which have been affirmed.” Such language is not there; the only permissible conclusion is that Congress did not intend it to be there.

Nowhere in the Code is there any language in broad form giving the Board the equivalent of supervisory jurisdiction over courts martial. It has no authority to direct a court martial concerning any proceeding except that it may order a rehearing, and even then, the convening authority may dismiss the charges if it finds a rehearing impracticable.

The plain, ordinary meaning of the language used indicates clearly that Congress intended the Board of Review to have those powers ordinarily exercised by all of the appellate courts of the States, and of the United States; i.e. to set aside convictions which are not sustained either by the law or the facts and to set aside sentences or such parts of sentences as may be incorrect in law or in fact. Its authority goes a bit further; it has the authority of a clemency board. It can set aside any part or amount of the sentence which it determines on the basis of the entire record should be set aside. Congressional intent in conferring that clemency power can be determined from the Senate and House Committee reports both of which say, "The Board may set aside on the basis of the record, any part of a sentence; either because it is illegal or because it is inappropriate." It is contemplated that this power will be exercised to establish uniformity of sentences throughout the Armed Forces." S. Rep. #486, 81st Cong. 1st Sess. 28 (1949); H.R. Rep. #491, 81st Cong. 1st Sess. 31-32 (1949).

Statutes Will Not Be Construed to Overturn Long Established Rules or Principles Unless an Intent to Do So Plainly Appears by Express Declaration or Necessary or Unmistakable Implication.

The Board of Review was originally created by Art. of War 50½, 41 Stat. 799, 10 U.S.C.A. 1522 enacted June 4, 1920. Concerning the authority of the Board of Review in cases where the findings or the sentence have been vacated in part that statute provided:

"... when ... the Board of Review holds the record of trial legally insufficient to support the findings or sentence; either in whole or in part ... such findings and sentence shall be vacated in whole or in part in accord with such holding ... and the record shall

be transmitted . . . to the convening authority for a rehearing or such other action as may be proper . . ."

The Articles of War were amended on June 24, 1948 by public law 759, Ch. 625. Art. 50½ was replaced by Art. 50. So much of Art. 50 as concerns the question at hand reads as follows:

"e (3) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence in whole or in part . . . the findings and sentence shall thereby be vacated in whole or in part in accord with such holding, and the record shall be transmitted . . . to the convening authority for rehearing or such other action as may be appropriate."

It would be hard to find language which, as applied to the facts of this case, would more clearly and certainly require the Board of Review to return the record for rehearing. The Board found the record of trial legally insufficient to support a part of the findings and of course it followed that the record was also insufficient to support a part of the sentence. The language is mandatory. The findings and the sentence *shall* thereby be vacated in whole or in part in accord with such holding. The statute then says: "And the record shall be transmitted . . ."

It is not reasonable to suppose that Congress intended the radical departure from pre-existing law, claimed by respondents, without clear and specific language in the statute itself to show such a purpose. Not only is such language lacking in the act itself but even the reports of the Armed Services Committees of the Senate and the House failed to make any mention that the new Board of Review had the power to make an initial determination of a sen-

tence. There is nothing in either of those reports that would even imply such a change.

Initial determination of a proper sentence by an appellate court, where there is nothing in the record to show what punishment the trial court intended, is alien and repugnant to American precedents and traditions. The civil courts, State and Federal, have never presumed to have such power. There is no Federal statute to give such a power to the United States Courts and no statute has been found in any State which confers such authority on any State Appellate Court.

Probably respondent will assert the rule announced by this court in the case of *Claassen v. United States*, 142 U.S. 140, 12 S. Ct. 169, 35 L. ed. 966 (1891) as precedent or authority for initial sentencing power by appellate courts. The rule has been followed and reaffirmed in the case of *Carter v. Mc-Claughry* 183 U.S. 365, 22 S. Ct. 181, 46 L. ed. 236 (1902) and *Evans v. United States* 153 U.S. 608, 14 S. Ct. 939, 38 L. ed. 839 (1894) and in *Pinkerton v. United States* 328 U.S. 640, 66 S. Ct. 1180, 90 L. ed. 1489 (1946) as well as a number of other cases which it is unnecessary to cite here. That rule is as follows:

“In criminal cases the general rule as cited by Lord Mansfield before the Declaration of Independence is ‘That if there is any one count to support the verdict, it shall stand good notwithstanding all the rest are bad.’ (cases cited) And it is settled law in this court and in this Country generally, that in any criminal case, a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error if any one of the counts is good and warrants the judgment, because in the absence of anything in the record to show the contrary the presumption of law is

that the court awarded sentence on the good count only."

Petitioner does not dispute the rule. This Court is not asked to rescind or to modify it. It simply has no application to the facts of this case. Two conditions must be met in order to make the rule operative: (1) The count which has been held good must warrant the sentence imposed and (2) There must be an absence of anything in the record to show the contrary of the presumption. It is undisputed that the count which has been held good (attempted rape) does not warrant or support the sentence of life imprisonment. Furthermore, the record shows clearly that the court awarded sentence not "on the good count only" but on the bad count, murder. The law officer instructed the court only on the subject of maximum and minimum penalties for murder. The court fixed the penalty at life imprisonment which was the legal minimum for the murder count.

No authority, either in the nature of an adjudicated case or the writing of any scholar in military or civilian law, has ever been cited by the respondent in any of the other courts where this case or its companion cases have been argued, to show that the doctrine of the Claassen case has been enlarged to include cases where the sentence was greater than the maximum permissible for the count which has been held good. Indeed, the very language of the doctrine specifically excludes such a case from its application.

The very fact that the Lord Mansfield Doctrine or the Claassen Rule has been cited or used by this court is authority for the proposition that appellate courts do not have authority to allot a portion of the sentence against a count or a conviction which has been held good except where the facts bring the case within the limits of the rule. If appellate courts generally had the authority to apportion part of the sentence to the convictions which have been sustained,

without regard for the question of whether the sentence imposed by the trial court was in excess of the maximum for the conviction that has been sustained and without regard for the question of whether there is anything in the record to show that the court in fact intended the sentence to apply against the conviction which has been set aside, then there would be no need to have a rule of law as announced in the Claassen case.

It is significant that the United States Court of Military Appeals in a case where the procedure was controlled by the Uniform Code of Military Justice has found it necessary to invoke the Claassen Rule. *United States v. Bobby L. Keith* 1 U.S.C.M.A. 442, 4 C.M.R. 34 (July 3, 1952). In that case the defendant was convicted on several counts or charges each of which, by itself, was sufficient to warrant the entire sentence imposed. The court set aside some of the convictions but did not disturb the sentence. It held that the Claassen Rule was applicable. The significance of the case lies in the fact that the Court of Military Appeals bothered to make an exhaustive analysis of the rule and all of its ramifications because, if that court had been of the opinion that the Board of Review held the plenary power over judgments which the respondent asserts, then it would not have been necessary to apply the rule of the Claassen case. The court would simply have ruled that one of the counts was not good and thereupon would have remanded the case to the Board of Review to exercise its power over the sentence. Since the prior statute did not confer the authority in question and in the absence of any judicial precedent therefor the rule that legislatures will not be presumed to intend to overturn long established legal principles unless such intention is made clearly to appear by express declaration or necessary implication is applicable to the question at hand. 50 Am. Jr. 333 (Statutes sect. 340)

citing *St. Louis and S. F. R. Co. v. Delk* (C.C.A. 6th) 158 F. 931, (reversed on other grounds in 220 U.S. 580, 55 L. ed. 590, 31 S. Ct. 617)

In Construing a Statute All of the Various Provisions of It Should Be Read So That All May, If Possible, Have Their Due and Conjoint Affect Without Repugnancy or Inconsistency. *Helvering v. Credit Alliance Corporation*, 316 U.S. 107, 86 L. ed. 1307, 62 S. Ct. 989.

Does the interpretation demanded by respondent measure up to this rule. We have seen that if the Board, upon setting aside a conviction on a major charge has the power to fix a penalty on the remaining minor charges it might well be that such a penalty is in excess of that which the court martial might have fixed. Such a result is repugnant to other provisions of the statute as follow:

(a) The first sentence of Art. 66 c. provides that:

"(c) In a case referred to it the Board of Review shall act only with respect to the findings and sentence as approved by the convening authority."

(b) Art. 63 provides that on rehearing no sentence, "In excess of or more severe than the original sentence shall be imposed."

(c) Art. 62 says that no record may be returned, "For the purpose of increasing the severity of a sentence of a court martial unless the sentence prescribed for the offense is mandatory."

Consideration of the Code as a whole discloses the clear intent of Congress to give a soldier every possible protection against unnecessarily severe sentences. Upon conviction for any major offense a soldier has three more or less automatic reviews open to him and at each stage the reviewing authority may set aside findings of guilt or may

reduce the sentence but findings of not guilty may not be reinstated nor may any sentence be increased. Certainly such provisions are not consonant with or harmonious to an interpretation that the Board of Review should make an initial determination of a penalty, which is at the same time a final determination, thereby foreclosing the soldier of his two chances for a less severe penalty—the court martial itself and the convening authority.

It Is Considered a Reasonable and Safe Rule of Construction to Resolve Any Ambiguity in a Statute in Favor of a Just or Fair Interpretation Thereof. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U.S. 281, 52 L. ed. 1061, 28 S. Ct. 616; Carey v. Donohue, 240 U. S. 430, 60 L. ed. 726, 36 S. Ct. 386.

That there is ambiguity in the statute is conclusively shown by the fact that two Courts of Appeals have interpreted it in opposite ways. The Court for the Seventh Circuit said: "This action of imposing sentence was beyond the Board's authority because the statute grants it no such power" and the Court for the Third Circuit said: "Such reasonable reading and administration of the legislatively approved Code should not be disturbed by the civil courts."

The unjust or unfair effect of an interpretation of Art. 66 as urged by respondent, can readily be seen in this case. Congress clearly intended that a convicted soldier would initially be sentenced by the court martial and that thereafter he would have two more or less automatic chances for sentence reduction. Both the convening authority and the Board of Review have clemency powers.

In this case the soldier was given the maximum sentence for the crime of attempted rape. The court martial and the convening authority were prevented from exercising any

discretion over the proper sentence for that crime by reason of the minimum penalty for murder. While they were of the opinion that the murder conviction should stand nothing could be done to the sentence. The situation in which petitioner finds himself is not unique. It arises every time the Board sets aside a conviction for a major crime and sustains the conviction on a minor one.

It will be argued that the Board operating under the provisions of Art. 66 has actually saved petitioner from life imprisonment and that he has not been subjected to the whim of the prosecutor and that he has been given the benefit of full appellate procedure prescribed by Congress. If the action of the Board in setting aside the murder conviction was in the nature of clemency then that argument would be valid. However, in this case the Board determined that there was no evidence in the record to show that the actions of the defendants were in any way responsible for the death of the woman. The actions of the Board were therefore not in any way related to the function of clemency. In analyzing the impact on petitioner of the Board's conception of its powers we must be careful to remember that we are dealing with the case of a soldier who has been found innocent of the crime of murder. The Board's action relates back to the time of the trial itself and it cancels the finding of guilty. Petitioner is just as free of the guilt of murder as he would be if it were discovered that the victim of his improper advances was still living and that the dead body found the next morning was that of some other woman. In the light of the hypothetical situation just recited, it is easy to see in sharp focus first of all that the Board did not extend any clemency and secondly that its failure to order a hearing deprived petitioner of a substantial advantage which Congress intended. Art. 66 should not be interpreted to permit the safeguards which Congress gave, to depend

upon the personality or the ambition of the prosecuting officer. Of course if Congress had specifically given the Board of Review the powers as exercised then petitioner could make no legal complaint but the courts will be slow to interpret an ambiguous statute in a manner which appears to have such unjust or unfair results.

The Application of Art. 66 to This Case Is a Violation of the Ex Post Facto Prohibition of the U. S. Constitution If That Article Does Not Give the Accused the Right to a Rehearing.

The alleged offense occurred on March 16, 1951. At that time Article of War 50 was in effect and it governed review of cases of this kind. That article was explicit and mandatory. The pertinent part of it reads as follows:

“(3) When the Board of Review is of the opinion that the record . . . is legally insufficient to support the findings of guilty or sentence, . . . such findings and sentence shall thereby be vacated in accordance with such holding and the record shall be transmitted . . . to the appropriate convening authority for a rehearing or such other action as may be proper.”

It will be borne in mind that the review proceeding both before the convening authority and the Board were an integral part of the court martial process established by Congress. Review was not only a matter of right; it was automatic. Sentencing procedure consisted of three separate steps. No valid sentence existed until all three were completed.

The accused was taken into custody on March 17, 1951, the day after the alleged offense occurred. On May 31, 1951, the Uniform Code of Military Justice became effective.

tive. Trial before the court martial was started on June 8, 1951.

It is quite clear that if the Board of Review had governed itself in accordance with the provisions of Art. 50 petitioner would have been given a rehearing. Such a rehearing would have been before an entirely new court—none of the members of the old court would sit on the rehearing.

At such a rehearing there would be a substantial possibility that the defendant in view of his age and prior good record and taking into consideration the fact that he had been drinking, would receive a lighter sentence than the maximum. The Manual for Courts-Martial says: (p. 121 and 122)

... normally the maximum punishment will be reserved for an offense which is aggravated by the circumstances or after conviction of which there is received by the court evidence of previous convictions of similar or greater gravity. In the exercise of its discretion in adjudging a sentence, the court should consider evidence contained in the record respecting the character of the accused as given in former discharges, the number and character of previous convictions . . . and the circumstances extenuating or aggravating the offense. (4) . . . courts will, however, exercise their own discretion, and will not adjudge sentences known to be excessive in reliance upon the mitigating action of the convening or higher authority."

If the court martial fixed the maximum punishment, twenty years, the defendant would still have two chances for reduction of sentence; the convening authority and the Board of Review.

This Court said in the case of *Re Medley* 134 U.S. 160, 33 l. ed. 835, 10 S. Ct. 384.

“ . . . it may be said that any law which was passed after the commission of the offense for which the party is being tried, is an ex post factor law, . . . (if it) alters the situation of the accused to his disadvantage, and that no one can be criminally punished in this country except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, or by some law passed afterwards by which the punishment is not increased.

The case of *Kring v. Missouri* 107 U.S. 211, 26 L. ed. 506, 2 S. Ct. 443 is in point. Kring was charged with murder. At the time the act was committed, Missouri law provided that if any person plead guilty to second degree murder and the plea is accepted by the court he could not later be tried for first degree murder. Before Kring went to trial the Constitution of the State of Missouri was changed so as to permit prosecution for first degree murder even after acceptance of the plea of guilty to second degree murder. At his trial, Kring plead guilty to second degree murder and was sentenced to twenty-five years. He appealed to the Supreme Court of the State of Missouri on the claim of an agreement between the prosecuting attorney and his attorney that the sentence would not be more than ten years. The Supreme Court of Missouri set aside the conviction and Kring was given a new trial. On the new trial he was charged with first degree murder and was convicted and sentenced to hang. Kring sought a writ of habeas corpus. This Court said:

“ We have here a distinct admission that, by the law of Missouri as it stood at the time of the homicide in consequence of this conviction of the defendant of the crime of murder in the second degree, though that conviction be set aside, he could not again be tried for

murder of the first degree; and that, but for the change in the Constitution of the State of Missouri, such would be the law applicable in this case. When the attention of the Court (Missouri State Supreme Court) is called to the proposition that if such effect is given to the change in the Constitution, it would, in this case, be liable to objection as an *ex post facto* law, the only answer is that there is nothing in it as the change is simply in a matter of procedure.

Whatever may be the essential nature of the change, it is one which, to the defendant, involves the difference between life and death, and the retroactive character of the change cannot be denied."

The Court further said, quoting from *U. S. v. Hall*, 2 Wash. (C.C.) 366:

"Accordingly, in a subsequent case tried before Mr. Justice Washington, he said . . . 'That an *ex post facto* law is one, which in its operation, makes that criminal which was not so at the time the action was performed or which increases the punishment, or in short, which, in relation to the offense or its consequences alters the situation of a party to his disadvantage.'"

It must be recognized that, in general, changes which affect only the procedure for trial or prior to trial are not prohibited by the *ex post facto* clause. A number of examples of such changes are listed in 11 Am. Jur. 1185 (Constitutional Law, Sec. 357). However, in that same section the writer says:

"There may however be procedural changes which operate to deny the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh

and arbitrary manner as to fall within the Constitutional prohibition.”.

Most of the provisions of the Uniform Code of Military Justice guarantee greater rights and more protection to an accused person than he formerly enjoyed. At least it cannot be seen how any of them could “affect an accused in such a harsh and arbitrary manner as to fall within the Constitutional prohibition.” That is true so far as Art. 66 is concerned, if that Article is to be interpreted so as to give to the accused the three chances which he had under the law as it existed at the time the alleged offense was committed.

On the other hand, if Article 66 is to be interpreted as urged by the Government it would seem quite clear that its application to the appellate procedures of this case would amount to a violation of the ex post facto clause. Changing sentence procedure so that a simple majority of the Board, (two out of three) can effectively impose a final sentence where formerly a sentence of this kind required a three-fourths vote of the court martial plus approval of the convening authority, is not a limited or unsubstantial matter and it comes within the rule of “changes which affect the accused in such a harsh and arbitrary manner as to fall within the Constitutional prohibition.”

Conclusion

For the reasons stated the action of the Board of Review was beyond its authority and was therefore void. Petitioner is imprisoned without a valid legal sentence and therefore the writ should issue and petitioner should be discharged.

Respectfully submitted,

EDWARD R. VAN SUSTEREN,
Counsel for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	3
Statement	8
Summary of argument	13
Argument	19
I. The sentence of the court-martial covered the convictions both for murder and attempted rape	24
A. Courts-martial are authorized to impose only a single sentence, no matter the number of charges of which the accused is found guilty	24
B. The sentence here covered the charge of attempted rape	26
II. Reviewing authorities may approve only those findings of guilty and such portions of the sentence as are found correct in law and fact. In determining an appropriate sentence, they are not bound by what the court-martial might have imposed had it considered only the findings approved	30
A. The convening authority has always had broad power to adjust sentences without regard to what the court-martial might have done	30
B. Boards of review possess the same power as does the convening authority to weigh facts and determine sentence appropriateness, without regard to what the court-martial might have done had it considered only the findings as affirmed	44
III. The adjustment of sentence by the board of review was appropriate	62

Conclusion.....	Page 67
Appendix.....	68

CITATIONS

Cases:

<i>Allen v. Wilkinson</i> , 129 F. Supp. 73.....	63
<i>Bozza v. United States</i> , 330 U. S. 160.....	32
<i>Brewster v. Swope</i> , 180 F. 2d 984.....	32
<i>Burns v. Wilson</i> , 346 U. S. 137.....	20, 21
<i>Campo, Ex parte</i> , 71 F. Supp. 543.....	63
<i>Carter v. McClaughry</i> , 183 U. S. 365.....	13, 16, 25, 41, 42
<i>Carter, Rose ex rel. v. Roberts</i> , 99 Fed. 948, certiorari denied, 176 U. S. 684.....	26
<i>De Coster v. Madigan</i> , 223 F. 2d 906.....	8,
	11, 12, 13, 14, 28, 29, 61, 63
<i>Flackman v. Hunter</i> , 75 F. Supp. 871.....	63
<i>Gibson v. United States</i> , 149 F. 2d 381.....	32
<i>Grafton v. United States</i> , 206 U. S. 333.....	22
<i>Grimley, In re</i> , 137 U. S. 147.....	20
<i>Gusik v. Schilder</i> , 340 U. S. 128.....	20
<i>Harlan v. McGourin</i> , 218 U. S. 442.....	32
<i>Hiatt v. Brown</i> , 339 U. S. 103.....	20, 22
<i>Jackson v. Humphrey</i> , 135 F. Supp. 776.....	11
<i>Jackson v. Taylor</i> , 234 F. 2d 611.....	12
<i>Mosher v. Hudspeth</i> , 123 F. 2d 401, certiorari denied, 316 U. S. 670.....	26
<i>Pierce v. United States</i> , 252 U. S. 239.....	32
<i>Runkle v. United States</i> , 122 U. S. 543.....	42
<i>Sanford v. Callan</i> , 148 F. 2d 376.....	63
<i>Spirou v. United States</i> , 24 F. 2d 796, certiorari denied, 277 U. S. 596.....	32
<i>Swaim v. United States</i> , 165 U. S. 553.....	26
<i>United States v. Bigger</i> , 2 USCMA 297, 8 CMR 97.....	55, 65
<i>United States v. Duffy</i> , 3 USCMA 20, 11 CMR 20.....	31
<i>United States v. Field</i> , 3 USCMA 182, 11 CMR 182.....	34
<i>United States v. Field</i> , 5 USCMA 379, 18 CMR 3.....	16,
	33, 34, 35
<i>United States v. Fletcher</i> , 148 U. S. 84.....	26
<i>United States v. Fowler, et al.</i> , 1 USCMA 713.....	11
<i>United States v. Fowler</i> , 2 CMR 336.....	10, 62
<i>United States v. Freeman</i> , 4 USCMA 76, 15 CMR 76.....	65
<i>United States v. Gephart</i> , 4 CMR 306.....	44

Cases—Continued

	Page
<i>United States v. Goodwin</i> , 5 USCMA 647, 18 CMR 271	65
<i>United States v. Jackson</i> , 2 USCMA 179	20
<i>United States v. Jefferson</i> , 7 USCMA 193, 21 CMR 319	31
<i>United States v. Keith</i> , 1 USCMA 442, 4 CMR 34	25, 53
<i>United States v. Lanford</i> , 6 USCMA 371, 20 CMR 87	31
<i>United States v. Massey</i> , 5 USCMA 514, 18 CMR 138	31
<i>United States v. Stene</i> , 7 USCMA 277, 22 CMR 67	57, 66
<i>United States v. Voorhees</i> , 4 USCMA 509, 16 CMR 83	64, 65
<i>United States v. Wise</i> , 6 USCMA 472, 20 CMR 188	31
<i>Whelchel v. McDonald</i> , 340 U. S. 122	20

Statutes:

Articles of War of 1806:

Article 65 (2 Stat. 367)	37
Article 89 (2 Stat. 369-370)	37

Articles of War of 1874:

Article 112, R. S. 1342	38
-------------------------	----

Articles of War of 1916:

Article 47 (39 Stat. 657)	38
Article 50 (39 Stat. 658)	38

Articles of War of 1920:

Article 50 (41 Stat. 797)	38
Article 50½ (41 Stat. 797-799)	45

Articles of War of 1920, as amended by Public Law 759, 80th Cong. (approved June 24, 1948), 10 U. S. C. (1946 ed., Supp. IV) 1471-1593:

Article 47 (10 U. S. C. (1946 ed., Supp. IV) 1518)	3, 16, 38, 39
Article 48 (10 U. S. C. (1946 ed., Supp. IV) 1519)	47, 48
Article 49 (10 U. S. C. (1946 ed., Supp. IV) 1520)	47, 49
Article 50 (10 U. S. C. (1946 ed., Supp. IV) 1521)	4, 46, 47
Article 51 (10 U. S. C. (1946 ed., Supp. IV) 1523)	38, 47, 49
Article 92 (10 U. S. C. (1946 ed., Supp. IV) 1564)	3, 8, 9
Article 96 (10 U. S. C. (1946 ed.) 1568)	3, 8

Uniform Code of Military Justice, Act of 5 May 1950, 64 Stat. 108, 50 U. S. C. (1952 ed.) 551-736, effective May 31, 1951, recently revised and recodified as 10 U. S. C. 801, *et seq.*, Public Law 1028, 84th Cong., 2d Sess. (approved August 10, 1956):

Article 16, 10 U. S. C. 816	22
-----------------------------	----

Statutes—Continued

Uniform Code of Military Justice, etc.—Continued		Page
Articles 18, 19, and 20, 10 U. S. C. 818, 819, and 820		24
Article 22, 10 U. S. C. 822		22
Article 34, 10 U. S. C.		22
Article 36, 10 U. S. C. 836		21
Article 51, 10 U. S. C. 851	8, 9,	24
Article 56, 10 U. S. C. 856		63
Article 59, 10 U. S. C. 859		56
Article 60, 10 U. S. C. 860		22
Article 62, 10 U. S. C. 862	15, 31,	60
Article 64, 10 U. S. C. 864	15, 22, 30, 40,	43
Article 66, 10 U. S. C. 866		6,
	9, 20, 23, 51, 52, 55, 57, 60, 61,	64
Article 67, 10 U. S. C. 867		20, 53
Article 71, 10 U. S. C. 871	15, 23, 31,	65
Article 73, 10 U. S. C. 873		20
Article 76, 10 U. S. C. 876		20

Miscellaneous:

Annual Report of the United States Court of Military Appeals, the Judge Advocates General of the Armed Forces and General Counsel of the Department of the Treasury, for the period 1 January 1955 to 31 December 1955	59
95 Cong. Rec. 5729, May 5, 1949	52
Executive Order 9363, 23 July 1943, 3 Code Fed. Regs. 34 (Supp. 1943)	46
Executive Order 9556, 26 May 1945, 3 Code Fed. Regs. 70 (Supp. 1945)	46
Fratcher, <i>Appellate Review in American Military Law</i> , 14 Missouri Law Review 15, 34-35	38, 45, 46
General Orders No. 169, Sec. 1, War Dept., 29 Dec. 1917 (Superseded effective 1 Feb. 1918, by Sec. 1, General Order No. 7, War Dept., 17 Jan. 1918)	44, 45, 68
Hearing of Subcommittee of Committee on Armed Services, United States Senate, 81st Cong., 1st Sess., on S. 857 and H. R. 4080	42, 43, 50
House Report No. 491, 81st Cong., 1st Sess.	52
Manual for Courts-Martial, 1949, Executive Order 10020, 13 F. R. 7519:	
Par. 87b, pp. 91-92	16, 40
Par. 89, p. 100	49

Miscellaneous—Continued

Manual for Courts-Martial, U. S., 1951, Executive Order 10214, 16 F. R. 1303:	Page
Par. 39b, p. 55.....	26
Par. 76b (1), p. 123.....	26
Par. 76b (2), p. 124.....	28
Par. 80b, p. 130.....	60
Par. 88, pp. 147-148.....	36, 32
Par. 92, p. 160.....	60
Par. 105a, p. 174.....	65
Par. 109-111, pp. 176-183.....	20
Par. 126d, p. 208.....	64
Par. 127c, Table of Maximum Punishments, pp. 220, 225.....	10, 64
App. 8a, p. 521.....	9, 24
Senate Report No. 486, 81st Cong., 1st Sess.....	43, 51
Uniform Rules of Procedure for Proceedings In and Before Boards of Review, Rule IX F, Dept. of Army Bulletin No. 9, dated June 8, 1951.....	23
Winthrop, <i>Military Law and Precedents</i> (2d Ed., 1920 Reprint).....	39
65 Yale Law Journal 413.....	29

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 619

CHESTER E. JACKSON, PETITIONER

v.

JOHN C. TAYLOR, ACTING WARDEN, UNITED STATES
PENITENTIARY, LEWISBURG, PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

No. 620

HARRIEL L. FOWLER, PETITIONER

v.

FREDERICK H. WILKINSON, WARDEN, UNITED STATES
PENITENTIARY, ATLANTA, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

In No. 619, the opinion of the Court of Appeals
for the Third Circuit (R. 16-22) is reported at 234 F.

2d 611. The opinion of the District Court (R. 7-14) is reported at 135 F. Supp. 776.

In No. 620, the opinion of the Court of Appeals for the Fifth Circuit (R. 39-40) is reported at 234 F. 2d 615. The opinion of the District Court (R. 22-23) is not reported.

JURISDICTION

In No. 619, the judgment of the Court of Appeals was entered on May 31, 1956 (R. 22). The petition for a writ of certiorari was filed August 21, 1956, and granted on December 10, 1956 (R. 23). 352 U. S. 940.

In No. 620, the judgment of the Court of Appeals was entered on June 27, 1956 (R. 40). The petition for a writ of certiorari was filed on September 25, 1956, and was granted on December 10, 1956 (R. 41). 352 U. S. 940.

In both cases, the jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, after a general court-martial had convicted a soldier of the two crimes of premeditated murder and attempted rape and imposed one aggregate sentence of life imprisonment for both offenses, the Army Board of Review, after reversing the finding of guilt on the murder charge, had authority to reduce the sentence to the maximum sentence for attempted rape.

STATUTES INVOLVED

Article of War 92 (10 U. S. C. (1946 ed., Supp. IV) 1564) provided:

Murder; rape (article 92).

Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated he shall be punished as a court-martial may direct. Any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct: *Provided*, That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

Article of War 96 (10 U. S. C. (1946 ed.) 1568) provided:

Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court martial, according to the nature and degree of the offense, and punished at the discretion of such court.

Article of War 47 (10 U. S. C. (1946 ed., Supp. IV) 1518 provided in part:

(d) *Approval.*

No sentence of a court-martial shall be carried into execution until the same shall have been approved by the convening authority: * * *

(f) *Powers incident to power to approve.*

The power to approve the sentence of a court-martial shall include—

(1) the power to approve or disapprove a finding of guilty and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;

(2) the power to approve or disapprove the whole or any part of the sentence; and

(3) the power to remand a case for rehearing under the provisions of article 52.

Article of War 50 (10 U. S. C. (1946 ed., Supp. IV) 1521) provided in part:

§ 1521. *Appellate review (article 50)—(a) Board of Review; judicial council.*

The Judge Advocate General shall constitute, in his office, a Board of Review composed of not less than three officers of the Judge Advocate General's Department. He shall also constitute, in his office, a Judicial Council composed of three general officers of the Judge Advocate General's Department; * * *

(d) *Action by Board of Review when approval by President or confirming action is required.*

Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President or confirmation by any other confirming authority is submitted

to the President or such other confirming authority, as the case may be, it shall be examined by the Board of Review which shall take action as follows:

(1) In any case requiring action by the President, the Board of Review shall submit its opinion in writing, through the Judicial Council which shall also submit its opinion in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the Board's and Council's opinions, with his recommendations, directly to the Secretary of the Department of the Army for the action of the President: *Provided*, That the Judicial Council, with the concurrence of the Judge Advocate General shall have powers in respect to holdings of legal insufficiency equal to the powers vested in the Board of Review by subparagraph (3) of this paragraph.

(2) In any case requiring confirming action by the Judicial Council with or without the concurrence of the Judge Advocate General, when the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence it shall submit its opinion in writing to the Judicial Council for appropriate action.

(3) When the Board of Review is of the opinion that the record of trial in any case requiring confirming action by the President or confirming action by the Judicial Council is legally insufficient to support the findings of guilty and sentence, or the sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, it shall submit its holding to the Judge Advo-

cate General and when the Judge Advocate General concurs in such holding, such findings and sentence shall thereby be vacated in accord with such holding and the record shall be transmitted by the Judge Advocate General to the appropriate convening authority for a rehearing or such other action as may be proper.

(4) In any case requiring confirming action by the President or confirming action by the Judicial Council in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, or the sentence, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action or for other appropriate action in a case in which confirmation of the sentence by the President is required under article 48a.

* * * * *

(g) *Weighing evidence.*

In the appellate review of records of trials by courts-martial as provided in these articles the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact.

Article 66 of the Uniform Code of Military Justice (50 U. S. C. (1952 ed.) 653)¹ provides in pertinent part:

¹This section has recently been revised, and recodified as 10 U. S. C. 866, P. L. 1028, 84th Cong., 2d Sess. (approved August 10, 1956). The changes in language do not appear to be pertinent to this case.

(a) The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review, each composed of not less than three officers or civilians, each of whom shall be a member of the bar of a Federal court or of the highest court of a State of the United States.

(b) The Judge Advocate General shall refer to a board of review the record in every case of trial by court-martial in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more.

(c) In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the board of review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the Presi-

dent or the Secretary of the Department or the Court of Military Appeals, instruct the convening authority to take action in accordance with the decision of the board of review. If the board of review has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

STATEMENT

Petitioners Fowler and Jackson were soldiers in the United States Army in Korea when, on June 9, 1951, they were found guilty by an Army general court-martial, there convened, of the premeditated murder of a Korean woman on March 16, 1951, in violation of Article of War 92 (10 U. S. C. (1946 ed., Supp. IV), 1564, *supra*) and of attempted rape, in violation of Article of War 96 (10 U. S. C. (1946 ed.) 1568, *supra*) (No. 619, R. a-b; No. 620, R. 1-3).² After the findings of guilt were returned by the court-martial (a procedure which corresponds to verdict in civilian courts), the law officer instructed its members in open court as follows (No. 620, R. 27):³

² Petitioners were tried with Carl A. De Coster (see *De Coster v. Madigan*, 223 F. 2d 906 (C. A. 7)). All three were convicted of the same offenses, given the same sentence, and received the same treatment from the board of review.

³ Although the charges under which petitioners were tried alleged violations of the Articles of War, the Uniform Code of Military Justice became effective on May 31, 1951, so that the trial on June 8, 1951, and subsequent proceedings, were held under the procedures proscribed by the Uniform Code. Under Article 51 (b) and (c) of that Code (10 U. S. C. 851 (b) and (c)), the law officer no longer deliberates with the court but rules on questions of law which arise during the proceedings. "[B]efore a vote is taken on the findings," he is required to instruct the court

LO [Law Officer]: Each accused stands convicted of Specification 1, violation of the 92d Article of War. The punishment on a conviction of the 92d Article of War must be either death or life. It cannot be other than those two sentences. This is provided in the Manual for Courts-Martial 1949, page 296, "Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct." The court will be closed.*

Thereafter, the court-martial sentenced each petitioner to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for the term of his natural life (No. 620, R. 27-28). The convening authority of the general court-martial, the Commanding General of the 2d Infantry Division, approved the sentences on July 3, 1951 (No. 620, R. 28).

Pursuant to Article 66, Uniform Code of Military Justice, 10 U. S. C. 866, the record of trial was reviewed, on January 15, 1952, by a board of review in the office of the Judge Advocate General of the Army. The board held that it was not convinced beyond a reasonable doubt of petitioners' guilt of premeditated

members as to the elements of the offense, and to give four other instructions specified in Article 51(c). None of these relates to sentencing. The Manual for Courts Martial, United States, 1951, App. 8a, states in a section relating to sentence procedure (p. 521) that "before closing, the LO [Law Officer] may advise the court of the maximum punishment which may be imposed (76b (1))", and that "the court will adjudge a single sentence for all the offenses of which the accused was found guilty."

*The Manual reference alluded to by the law officer repeats the punishment provision of Article of War 92 (10 U. S. C. (1946 ed., Supp. IV) 1564), *supra*, p. 3.

murder. It therefore set aside the convictions for premeditated murder while sustaining the convictions for attempted rape. Because the maximum permissible sentence for attempted rape was twenty years' imprisonment,⁵ the board noted that the aggregate sentences of confinement at hard labor for life were improper. The board then concluded that the maximum sentence for attempted rape was appropriate for each accused. "[u]nder the vicious circumstances of this case," and took the following action (CM 347258, *United States v. Fowler*, 2 CMR 336, at pp. 345-346; No. 620, R. 28-29):

ACTION BY THE BOARD

For the reasons stated, the board of review finds as to each accused: that the approved findings of guilty of Specification 1 of the Charge and the Charge [premeditated murder] are incorrect, in law and fact and the same are set aside; that the approved finding of guilty of Specification 2 of the Charge and the approved finding of guilty of a violation of the 96th Article of War [attempted rape] are correct in law and fact; and that only so much of the approved sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years is correct in law and fact. The board of review having determined upon the basis of the entire record that the approved findings of guilty, except as thus set aside, and the approved sentence, as modified, should be approved as to each accused, such

⁵ Manual for Courts-Martial, United States, 1951, par. 127c, p. 225.

findings, except as thus set aside, and sentences, as modified, are

Affirmed.

Petitioners then filed petitions with the United States Court of Military Appeals seeking further review of their case. They raised no question as to the authority of the board of review to modify the sentence in the manner described above (No. 619, R. 17; No. 620, R. 30). These petitions were denied without opinion. *United States v. Fowler, et al.*, 1 USCMA 713.

Petitioner Jackson made his first challenge to the sentence modification by the board of review in his petition for a writ of habeas corpus to the United States District Court for the Middle District of Pennsylvania, where he contended that "the action of the Review Board in reserving twenty (20) years of the life sentence imposed by the Court-Martial for the crime of murder, even though it had reversed and set aside the conviction, was null and void" (No. 619, R. e). In an opinion denying the writ and discharging the rule to show cause (*Jackson v. Humphrey*, 135 F. Supp. 776; No. 619, R. 7-14), the District Court held that the board of review, on reversing the murder count, properly modified the sentence and was not required to order a new trial or remand the case for resentencing by the general court-martial.

The Court of Appeals, in its unanimous opinion affirming the District Court's holding, expressly rejected the reasoning of *De Coster v. Madigan*, 223 F. 2d 906 (C. A. 7), a habeas corpus action where the

codefendant De Coster (see fn. 2; *supra*, p. 8) was released on the ground that, when the murder conviction was set aside, the board of review had no power to fix the sentence for attempted rape (No. 619, R. 16-22).

In his petition for a writ of habeas corpus to the United States District Court for the Northern District of Georgia, petitioner Fowler similarly attacked the sentence as modified by the board of review. Among other things, he alleged that " * * * the Board of Review was not vested with any authority to give the petitioner a 20-year sentence and same is a void commitment under which the petitioner may not legally be held" (No. 620, R. 5, 30). In an unpublished opinion, the District Court agreed with the majority in *De Coster v. Madigan*, *supra*, 223 F. 2d 906 (C. A. 7), and granted the writ, stating: "This Court cannot assume that had he not been sentenced for murder, however, his sentence for attempt to rape would have been twenty years" (No. 620, R. 23). This decision was reversed in a *per curiam* opinion by the Court of Appeals for the Fifth Circuit (No. 620, R. 39-40), on the authority of *Jackson v. Taylor*, 234 F. 2d 611 (C. A. 3), *Jackson v. Humphrey*, 135 F. Supp. 776 (M. D. Pa.), and the dissenting opinion in *De Coster v. Madigan*, 223 F. 2d 906 (C. A. 7).⁹

⁹ While the government was of the view that the *De Coster* opinion and holding were incorrect, it did not seek certiorari because the ruling seemed limited, in the words of the court, to "the curious combination of circumstances involved in this case", 223 F. 2d at p. 909, and the decision (as distinguished from some of the language in the opinion) did not necessarily lay down a

SUMMARY OF ARGUMENT

Petitioners were convicted of premeditated murder and attempted rape. The law officer of the court-martial thereafter instructed that the sentence for premeditated murder could be only life imprisonment or death, but he gave no instruction as to the punishment for attempted rape. A sentence to life imprisonment was imposed. Later, on mandatory review, the board of review disapproved the conviction for premeditated murder, affirmed the conviction for attempted rape, and reduced the sentence to twenty years' imprisonment. The issue is whether the board of review has the power thus to determine an appropriate sentence for the affirmed conviction of attempted rape.

I

In military law, a single gross sentence is imposed by the fact-finders for all of the offenses of which the accused has been found guilty. *Carter v. Mc-*

broad rule applicable to court-martial cases not involving the same unusual set of circumstances. The Seventh Circuit reasoned that, since the law officer had instructed the court only as to the penalty for murder, the court intended the penalty of life imprisonment to apply only against the murder finding, and that, when the murder finding was reversed, the defendant remained unsentenced for the rape. See *infra*, p. 29. On this assumption, it found that, when the board of review reduced the original sentence, it was not modifying an existing sentence but sentencing in the first instance, an authority not conferred upon it by Article 66, *supra*, p. 7. Conflict with the instant cases developed only after the time for petitioning for certiorari in *De Coster* (as extended for the maximum period) had expired. Neither of the district court decisions in the *Jackson* and *Fowler* cases had been rendered by the time the government's right to petition in *De Coster* expired.

Claughry, 183 U. S. 365. Such a sentence in the entirety was imposed here. The fact that the law officer instructed only as to the penalty for murder is explained by the circumstance that an instruction as to the penalty for an attempted rape would have been a futility: an accused cannot be confined for a period in excess of life imprisonment (the minimum penalty for premeditated murder). Accordingly, the instruction nowise detracts from the conclusive presumption that the sentence represents a penalty covering both of the convictions of each accused. This conclusion is fortified by the facts (1) that the law member is not required to give any instruction concerning the imposition of sentence and (2) that the court-martial members have an unqualified duty to impose a single sentence covering all of the convictions which they return. The conflicting opinion of the Court of Appeals for the Seventh Circuit in *De Coster v. Madigan*, 223 F. 2d 906, fails to give effect to the distinctive features of military practice.

II

The sentence was properly adjusted by the board of review. In military practice, broad powers over the sentence are lodged in various reviewing authorities. The powers of review, modification, and sentence-adjustment cannot, in the nature of things, be committed to courts-martial. The court-martial is a temporary organ, having neither continuity nor permanent situs, which acts essentially as a fact-finding body or lay jury during its limited tenure. The power to adjust sentences upon review—a function essen-

tially judicial and executive in character—has always rested elsewhere.

A. The first stage of review is provided by the convening authority—the officer who has assembled the particular court-martial and directed it to try the particular case. His review is mandatory in every case where a finding of guilt is reached and a sentence is imposed. He may not increase the punishment imposed by the court-martial, and he cannot alter a finding of not guilty, but within these limits he is unfettered (Article 62). Congress has given him the power to weigh the facts, determine the credibility of witnesses, disapprove findings of guilt which he regards as erroneous either in fact or law, and determine sentence appropriateness without regard to what the court-martial might have done had it considered only the approved findings (Article 64). The power to suspend sentence is also lodged in the convening authority, rather than in the court-martial (Article 71). The court-martial is bound to impose a minimum sentence to life imprisonment for premeditated or felony murder, but the convening authority may reduce this. All cases returned by the board of review or the United States Court of Military Appeals for rehearing (retrial) on some or all of the charges are returned to the appropriate convening authority. He may dismiss the charges if he deems a rehearing impracticable. If the accused was convicted of several charges and a hearing has been ordered as to some, but not all, the convening authority may dismiss those ordered reheard and deter-

mine an appropriate sentence for those affirmed, so long as the sentence he approves does not exceed that imposed by the court-martial and is within legal limits.

The convening authority's power to alter sentences did not begin with the enactment of the Uniform Code of Military Justice, 10 U. S. C. 801 *et seq.*, the present law. As early as 1806, Congress expressly gave him the power to remit or mitigate sentences to confinement, and it has continued this power in each successive enactment since that time. Before 1916, the convening authority could only approve or disapprove a finding in its entirety, but since that time he has been authorized to approve any lesser offense necessarily included in that found by the court-martial. He has never been limited to consideration of errors of law, but has always been authorized to exercise his discretion in relation to the entire proceedings. This Court has recognized this broad power. *Carter v. McCloughry*, 183 U. S. 365.

Article of War 47 (10 U. S. C. (1946 ed., Supp IV) 1518) and Manual for Courts-Martial, 1949, par. 7b, spelled out the powers of the convening authority, noted above. The legislative history of the present Code shows that Congress intended to continue these powers, and the statute permits of no other construction. *United States v. Field*, 5 USCMA 379, 18 CMR 3.

B. The second stage of review in military law is review by boards of review. Each board is composed of three lawyers, either military or civilian, who sit in the offices of the respective Judge Advocates General. Review by such a board is mandatory in cases

of the type here involved. Boards of review are authorized to weigh facts, determine credibility of witnesses, consider errors of law, and affirm such findings (and only those) which they find to be correct in law and in fact. In addition, they have been directed by Congress to affirm only that sentence to confinement, or any part thereof, which they believe to be appropriate and which does not exceed the sentence adjudged by the court-martial. Thus, there is duplicated, at the second stage of review, two of the most important powers of the convening authority: the power to consider the facts *de novo* and the power to determine sentence appropriateness.

Boards of review first came into being through a series of departmental orders issued by the Army during the first World War, and were first given statutory recognition in 1920. At that time, Congress gave them power to review records for legal sufficiency, a power which was to be exercised in concert with the Judge Advocate General. If the board and the Judge Advocate General disagreed, the case was to be forwarded to the Secretary of War for action by the President. The President was given absolute discretion to approve or disapprove all or any part of the findings or sentence, a power which he subsequently delegated in large part to the Secretary of War.

In 1948, Congress gave boards of review the power to weigh facts as well as determine legal sufficiency, but still did not give them the power to determine sentence appropriateness. However, the latter power was given, at this time, to the Judge Advocate Gen-

eral (who was to act concurrently with the board of review in determining the sufficiency of the record) and to the Judicial Council (a body of three general officers of the Judge Advocate General's Corps to be constituted in the Office of the Judge Advocate General).

During the hearings on the Uniform Code (which became effective in 1951), it was proposed that boards of review be authorized to determine sentence appropriateness as well as the factual and legal sufficiency of the record. Congress adopted the proposal, over opposition, as a measure which was in the interests of the accused and would promote uniformity of sentences throughout the armed forces. Article 66 of the present Code authorizes boards of review to " * * * affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."

The United States Court of Military Appeals provides the third and last stage of appellate review in the military system, and reviews questions of law in appropriate cases. That court has often had occasion to consider the extent of the power over sentences given by Congress to boards of review, and has concluded that the boards are entitled to determine sentence appropriateness without regard to what the court-martial might have done had it considered only the findings affirmed by the board. This construction, is the only one which gives full effect to the language of the statute, the intent of Congress as expressed in

the legislative history, and Article 66's background of prior law. Indeed, we think no other construction is possible if two established features of military law, both having long and unbroken histories, are to co-exist: (1) the practice whereby a court-martial imposes a single sentence in gross; (2) the investment in reviewing authorities of power to modify both the findings of the court-martial and the sentence imposed by the court-martial.

III

The board of review reduced the sentence here to confinement to the maximum permissible for attempted rape. That was an appropriate sentence on the facts. As revealed in the opinion of the board of review (CM 347258, *United States v. Fowler*, 2 CMR 336), a vicious offense had been committed. Certainly, reasonable men could conclude that the maximum penalty was warranted. In all events, the question of severity of sentence is not a matter which may be considered on habeas corpus if the sentence is legal.

ARGUMENT

The problem in these cases arises because of the practice, peculiar to military law, of fixing one gross sentence, no matter the number of offenses of which an accused may be found guilty. Here, the court-martial, on finding petitioners guilty of both murder and attempted rape, fixed the sentence at life imprisonment. When the board of review set aside the finding of murder, it adjusted the sentence for attempted rape to that which it found appropriate.

The issue is whether it had power to do so or whether the cases had to be referred back to the court-martial for resentencing on the attempted rape charge.⁷ We shall urge that, in the light of the established sentencing procedure in military practice and the powers of the board of review with respect to sentences, the adjustment in these cases was within the power of the board of review and appropriate to the circumstances.

⁷ There is doubt as to whether the issue raised by petitioner is cognizable in the first instance on habeas corpus. It would appear that petitioners' failure to exhaust their military remedies before the board of review, the Judge Advocate General, and the United States Court of Military Appeals would preclude review by the courts on habeas corpus, even if the issue that they raise went to the jurisdiction of the general court-martial or the board of review. See *Gusik v. Schilder*, 340 U. S. 128; *Welchel v. McDonald*, 340 U. S. 122, 124; *Burns v. Wilson*, 346 U. S. 137, 142 (opinion of Mr. Chief Justice Vinson). This doctrine is particularly apposite to these cases since the remedy of rehearing, which petitioners contend they should have been granted when the board of review reversed the murder finding, could have been sought from the board of review (Art. 66 (d), UCMJ, 10 U. S. C. 866 (d); *United States v. Jackson*, 2 USCMA 179) or the Court of Military Appeals (Art. 67 (e), UCMJ, 10 U. S. C. 867 (e)). Their present objections, raised for the first time before the federal courts on collateral attack, would seem to be foreclosed. See Article 76, UCMJ, 10 U. S. C. 876 (providing that the sentences of courts-martial as approved, reviewed, or affirmed shall be final and conclusive on all courts of the United States subject only to action upon a petition for a new trial); and see *Burns v. Wilson*, 346 U. S. 137, 146; *Hiatt v. Brown*, 339 U. S. 103, 111; *In re Grimley*, 137 U. S. 147, 150. The term "new trial" appears to be a word of art in military law, for it is used only in connection with relief sought on grounds of newly discovered evidence or fraud on the court. Article 73, UCMJ, 10 U. S. C. 873, MCM, 1951, par. 109-111, pp. 176-183.

The procedure which is followed in military law is that which has been enacted by Congress^{*} and promulgated by the President.⁹ As was said by Chief Justice Vinson, in *Burns v. Wilson*, 346 U. S. 137, 140:

Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that to Congress.

Accordingly, it will be necessary to summarize military review procedure so as to fix the place of the board of review in the appellate structure and to ex-

^{*} The basic structural framework of military law today is the Uniform Code of Military Justice, which has been in effect for nearly six years (Act of May 5, 1950, 64 Stat. 108, 50 U. S. C. (1952 ed.) 551-736, effective May 31, 1951, recently revised and recodified as 10 U. S. C. 801, *et seq.*, P. L. 1028, 84th Cong., 2d Sess. (approved August 10, 1956)). To avoid unnecessary repetition, it will be referred to hereafter as "the Code", or as "UCMJ."

⁹ Article 36 of the Code, 10 U. S. C. 836, provides that "The Procedure, including modes of proof, in cases before courts-martial, * * * may be prescribed by the President by regulations * * * Pursuant to this grant of authority, the President promulgated Executive Order 10214, 16 F. R. 1303, which is more widely known as the Manual for Courts-Martial, United States, 1951, and which will be referred to hereafter as "the Manual".

plain in detail its powers in cases tried by general court-martial.

General courts-martial are composed of at least five members and a law officer who serves as a judge (Article 16). They are “* * * lawful tribunals, with authority to finally determine any case over which they have jurisdiction * * *”,¹⁰ and are called into being by an officer exercising general court-martial authority (Article 34). The officer exercising general court-martial jurisdiction, commonly referred to as the convening authority, derives the power to constitute a court-martial and authorize it to proceed from Article 22 of the Code, 10 U. S. C. 822.

In addition to convening the court-martial, the convening authority is the first to act as a reviewing authority where there has been a finding of guilt by the court-martial (Article 60). This review is automatic. When acting in review, the convening authority is entitled to weigh the facts, judge the credibility of witnesses, and make findings of fact. He also determines the legal sufficiency of the convictions. With respect to the sentence, he is authorized not only to approve a legal sentence, but also to determine sentence appropriateness. However, he cannot increase the sentence imposed by the court-martial. In net effect, he has the power to disapprove any conviction and to reduce any sentence involving confinement if he, in his discretion, believes it proper to do so (Article 64). He has powers over

¹⁰ *Grafton v. United States*, 206 U. S. 333, 347; see also *Hiatt v. Brown*, 339 U. S. 103, 110.

a sentence to confinement which the court-martial does not have, for he may suspend it, while the court-martial may not (Article 71). Furthermore, he may reduce a sentence of life imprisonment even though the court-martial was bound to impose it as a mandatory minimum sentence (Manual for Courts-Martial, par. 88c, p. 148).

The second stage of appellate review in the military system is review by a board of review. These boards sit in the offices of the respective Judge Advocates General, and review by such a board is mandatory in all cases (such as those here involved) where the sentence approved by the convening authority includes a punitive discharge or some more rigorous punishment (Article 66). The boards of review consider the law, the facts, and the sentence. They are authorized to approve only that sentence which they believe to be appropriate for the affirmed convictions. They may not go outside the record to determine legal or factual sufficiency, but may do so to determine jurisdiction or a question of insanity.¹¹

The third and final stage of appellate review in the military system is provided by the United States Court of Military Appeals. Review of capital cases and cases involving a general or flag officer is mandatory. If the board of review has affirmed a sentence which includes a punitive discharge or some more rigorous punishment, the accused may petition the Court of Military Appeals for review. The court

¹¹ Rule IX F, Uniform Rules of Procedure for Proceedings In and Before Boards of Review, Dept. of Army Bulletin No. 9, dated June 8, 1951.

grants review for good cause and considers only questions of law. The Judge Advocate General may also certify questions to the court for review, if he disagrees with the decision of the board of review. (Article 67).

I

THE SENTENCE OF THE COURT-MARTIAL COVERED THE CONVICTIONS BOTH FOR MURDER AND ATTEMPTED RAPE

A. COURTS-MARTIAL ARE AUTHORIZED TO IMPOSE ONLY A SINGLE SENTENCE, NO MATTER THE NUMBER OF CHARGES OF WHICH THE ACCUSED IS FOUND GUILTY

Courts-martial have never been authorized to impose separate sentences for different offenses at a single trial. A single sentence is always imposed, regardless of the number of charges and specifications. Unlike the ordinary practice in civilian tribunals, this sentence is adjudged by the fact-finders (Article 51). Although Congress has several times revised the military code, it has made no specific provision respecting sentences, other than to impose certain limitations on their severity. The single, or gross, sentence practice in military law may thus be said to have implicit Congressional approval. The provisions of Articles 18, 19, and 20, Uniform Code of Military Justice, limiting the punishments which may be imposed by general, special, and summary courts-martial, respectively, clearly contemplate that a single sentence will be imposed in every case.

The Manual for Courts-Martial specifically provides (Appendix 8a, p. 521):

NOTE.—The sentence must be within the maximum limits prescribed in chapter XXV and

within the jurisdiction of the court to adjudge. As to rehearings and new trials see 81d and Article 63. *The court will adjudge a single sentence for all the offenses of which the accused was found guilty. A separate sentence must be adjudged for each accused* [Emphasis added.]

As the United States Court of Military Appeals stated in *United States v. Keith*, 1 USCMA 442, 448, 4 CMR 34:

* * * The concurrent sentence, in the sense in which that device is utilized in the administration of criminal law in the civilian community, is entirely without precedent in military procedure. See Manual for Courts-Martial, supra, paragraphs 76, 125, 126, 127. Under military law a single inclusive sentence is imposed—the sum of individual punitive actions deemed legal and adequate—regardless of the number or character of the offenses of which the accused has been convicted. It will be obvious that a rule which has its basis in a concurrent sentence situation is not an appropriate subject for importation into a system in which the instrument lying at the basis of the principle is unknown, and a unitary sentence is always assessed.

The validity of the practice of imposing a single sentence upon conviction by court-martial of more than one offense was recognized, and the practice specifically approved by this Court in *Carter v. McClaughry*, 183 U. S. 365, 393:

We understand the rule established by military usage to be “that the sentence of a court

martial shall be, in every case, an *entirety*; that is to say, that there shall be but a single sentence covering all the convictions on all charges and specifications upon which the accused is found guilty, however separate and distinct may be the offences found, and however different may be the punishments called for by the offenses." 1 Winthrop (2d ed.) 614.¹² [Emphasis in original].

This Court has also placed its stamp of approval on other cases in which a gross sentence has been imposed. *E. g., Swains v. United States*, 165 U. S. 553; *United States v. Fletcher*, 148 U. S. 84.

B. THE SENTENCE HERE COVERED THE CHARGE OF ATTEMPTED RAPE

Petitioners argue that, whatever the normal rule may be, this case does not fall within it, because of certain events which occurred at the court-martial trial. The law officer followed the normal—though not required—procedure of advising the court, *after* findings (verdict) and before sentence, as to the punishment it might impose.¹³ He told the court-martial that, having already found the petitioners guilty of premeditated murder, it could sentence only to life imprisonment or death. This was clearly correct, for the former punishment represents the mandatory minimum for that offense. He said nothing as to the penalty for attempted rape. The court-martial then deliberated and adjudged a gross sen-

¹² To the same effect are *Rose ex rel. Carter v. Roberts*, 99 Fed. 948, 950 (C. A. 2), certiorari denied, 476 U. S. 684; *Mosher v. Hudspeth*, 123 F. 2d 401, 402 (C. A. 10), certiorari denied, 316 U. S. 670.

¹³ Manual for Courts-Martial, 1951, par. 39b, p. 55, 76b (1), p. 123.

tence to life imprisonment. From these circumstances petitioners reason that punishment for attempted rape was not in fact considered by the court-martial and was not a component of the sentence; and that arithmetic establishes that no punishment was imposed for attempted rape, inasmuch as the sentences imposed represent the minimum for premeditated murder alone.

A full answer to this line of argument was given by the court below in No. 619. As Judge Hastie stated (R. 19-20):

Ingenious though this line of argument is, and persuasive though it has been to a majority of the division which decided *De Coster v. Madigan, supra*, in another circuit, we reject it. To begin with, it was not possible for the court which found the petitioner guilty of both premeditated murder and attempted rape to order imprisonment for either a longer or a shorter period than it did. For under military law the death sentence is the only lawful alternative to life imprisonment, once a defendant has been found guilty of premeditated murder, whether alone or in addition to some other crime. Thus, the failure of the law officer to say anything to the court about the maximum punishment for attempted rape suggests nothing more than that he understood how pointless such an explanation would have been in the posture of this case. Moreover, the arithmetical argument that a sentence for two offenses must be longer than the minimum sentence required for one of them ignores both the practical difficulty of imprisoning for life plus any number of years and the absence

of provision for any such oddity in the rules which control military sentencing.

The first portion of petitioners' argument also ignores the fact that the law officer is not *bound* to instruct upon the sentence, and that, if he does not, the members nevertheless have an absolute duty "to vote for a proper sentence for the offense or offenses of which the accused has been found guilty, * * *".¹⁴

The arithmetical argument is of no greater aid to petitioners. Even the majority opinion in *De Coster v. Madigan*, 223 F. 2d 906, 910 (C. A. 7), concedes that "any suggestion that the court-martial should have sentenced plaintiff[s] for a term of life plus twenty years would be ridiculous * * *". Petitioners can hardly mean to suggest that, had the court-martial members considered both offenses, they would have been bound to reason, "We *must* give at least life on the murder offense, we can give twenty years in addition on the offense of attempted rape, and therefore we will sentence petitioners to die for the murder." Yet, only if petitioners are willing to say that the existence of a conviction for attempted rape would require the imposition of the maximum penalty, death, for premeditated murder, can they argue that the sentence actually adjudged—life imprisonment—is evidence that they were not sentenced for both offenses.

The only authority which supports petitioners' position is *De Coster v. Madigan*, *supra*, 223 F. 2d

¹⁴ Manual for Courts-Martial, 1951, par. 76b (2), p. 124; emphasis added.

906, an opinion which the courts of appeal in the instant cases expressly declined to follow. We submit that *De Coster* is wrong for the following reasons:

(1) That opinion ignores the fact that court-martial sentences to confinement have always been imposed as an entirety; that is, a single sentence covering all the convictions on all the charges and specifications, however separate and distinct the offenses may be.

(2) It ignores the fact that court-martial members have a duty to consider all of the findings in deliberating on the sentence.

(3) It ignores the fact, discussed *infra* (Point II), that boards of review are entitled to weigh facts and determine sentence appropriateness without regard to what the court-martial would have done had it been faced with only the affirmed findings of guilt.¹⁵

¹⁵ A note in 65 Yale Law Journal 413, 417-418, says of the *De Coster* decision:

It is impossible to justify the court's conclusion that the court-martial had never intended or authorized a sentence "in gross." The accepted military usage is that a mandatory sentence imposed in a multiple-conviction case covers all the convictions. And the irrefutable fact is that *De Coster* was convicted of both murder and attempted rape. True, the court-martial sentence was the minimum permissible for the murder charge alone. But, short of the death penalty, the court-martial could not have imposed a greater sentence upon *De Coster* no matter how many offenses he was convicted of, and no matter how reprehensible they were. Moreover, the omission of sentencing instructions on the attempted rape conviction has no relevance. It did not divest the court-martial of sentencing jurisdiction, nor, in any way prejudice the accused. The Uniform Code and the *Courts-Martial Manual* make it clear that, once the accused has been duly convicted, sentencing instructions are not prerequisite to valid imposition of the sentence. They are discretionary

REVIEWING AUTHORITIES MAY APPROVE ONLY THOSE FINDINGS OF GUILTY AND SUCH PORTIONS OF THE SENTENCE AS ARE FOUND CORRECT IN LAW AND FACT. IN DETERMINING AN APPROPRIATE SENTENCE, THEY ARE NOT BOUND BY WHAT THE COURT-MARTIAL MIGHT HAVE IMPOSED HAD IT CONSIDERED ONLY THE FINDINGS APPROVED

Assuming, as we believe one must, that the life sentence imposed by the court-martial covered both offenses of which the accused were found guilty, the question remains—Where did the power to adjust the sentence lie when the murder convictions were disapproved? We shall show that this power to correct sentence has always been lodged in the reviewing authorities. The convening authority has always possessed it. And it was specifically granted to boards of review by recent legislation.

A. THE CONVENING AUTHORITY HAS ALWAYS HAD BROAD POWER TO ADJUST SENTENCES WITHOUT REGARD TO WHAT THE COURT-MARTIAL MIGHT HAVE DONE

1. In acting in a case on review, the convening authority has the power to “* * * approve only such findings of guilty, and the sentence ~~or~~ such part or amount of the sentence, as he finds correct in law and fact * * *” (Article 64). ^{*}(Emphasis added.). In addition, he has absolute discretion to remit or suspend any part of the sentence, except a death sen-

with the law officer. And the discretion exercised in De Coster could not have been prejudicial: the identical sentence would necessarily have been imposed with or without the omitted instructions.

tence (Article 71). He is not authorized to increase the punishment adjudged and he cannot alter a finding of not guilty (Article 62); he cannot go outside the record to find evidence to sustain the findings;¹⁶ but, subject to these limitations, he is unfettered. He must determine legal sufficiency, factual correctness, and sentence appropriateness. To that end, the convening authority is entitled to weigh the facts, determine the credibility of witnesses, and even consider evidence of innocence and evidence bearing on sentence appropriateness which may be outside the record of trial.¹⁷ Although courts-martial are obliged to adjudge a minimum sentence of life imprisonment for premeditated murder, the convening authority is not bound by this limitation.¹⁸

The congressional grant of power over sentences has been construed to mean that the convening authority must give individual attention to each case.¹⁹ Having given his consideration, he may affirm any legal term of confinement which is no greater than that adjudged by the court-martial and which he personally deems appropriate for the offenses approved.

¹⁶ *United States v. Duffy*, 3 USCMA 20, 11 CMR 20.

¹⁷ *United States v. Massey*, 5 USCMA 514, 18 CMR 138; *United States v. Lanford*, 6 USCMA 371, 20 CMR 87.

¹⁸ Manual for Courts-Martial, 1951, par. 88c, p. 148; *United States v. Jefferson*, 7 USCMA 193, 21 CMR 319.

¹⁹ *United States v. Wise*, 6 USCMA 472, 20 CMR 188.

The current Manual for Courts-Martial, par. 88, pp. 147-148, treats the convening authority's power to deal with the sentence in the following language:

Neither the convening authority nor any other officer is authorized to add to the punishment imposed by a court-martial. A sentence adjudged by the court may be approved, if it was within the jurisdiction of the court to adjudge and it does not exceed the maximum limits prescribed by the President under Article 56 (Ch. XXV) for the offenses of which the accused legally has been found guilty. When a sentence in excess of the legal limits is divisible, such part as is legal may be approved.²⁰

* * * However, when a court has adjudged a mandatory sentence to imprisonment for life (Art. 118 (1) and (4)) [premeditated or felony murder], the convening authority may approve any sentence included in that adjudged by the court.

Implicit in the statute and the Manual provisions is the concept that the convening authority is not required to order a rehearing (retrial) before the court-martial if he disapproves some of the findings

²⁰ A sentence to confinement is recognized as divisible in both military and federal law. Therefore, when it exceeds legal limits it may be void only as to the excess. *United States v. Keith*, *supra*, 1 USMA 442; *Bozza v. United States*, 330 U. S. 160, 166-7; *Pierce v. United States*, 252 U. S. 239, 252; *Harlan v. McGourin*, 218 U. S. 442; *Brewster v. Swope*, 180 F. 2d 984 (C. A. 9); *Gibson v. United States*, 149 F. 2d 381, 384 (C. A. D. C.); *Spirov v. United States*, 24 F. 2d 796 (C. A. 2), certiorari denied, 277 U. S. 596.

upon which the sentence was based. If a court-martial adjudges a sentence which exceeds legal limits for the approved findings, the convening authority may reduce it to a legal and appropriate sentence. If, in a multiple conviction case, he disapproves some of the findings of guilt returned by the court-martial, he is nevertheless entitled to approve the sentence adjudged by the court-martial, provided that it does not exceed the legal limits for the findings approved. If a case is returned to the convening authority for a rehearing after some, but not all, findings of guilty have been held erroneous by the board of review or by the Court of Military Appeals, and the convening authority determines that a rehearing is impracticable, he may dismiss the charges under which erroneous findings were returned and reassess a legal and appropriate sentence for the remaining findings of guilty. See *United States v. Field*, 5 USCMA 379, 18 CMR 3.

In the *Field* case, the accused had been convicted at his first trial of forgery and absence without leave. Upon review, the Court of Military Appeals reversed the finding as to forgery, affirmed the finding as to absence without leave, and remanded the case to the Judge Advocate General of the Army. It directed that the case be returned to the board of review to determine an appropriate sentence for absence without leave or that it be returned to the convening authority for rehearing, if practicable, on the forgery charge. In the latter event, the court-martial was to resentence as to both offenses if a finding of guilty was again returned as to forgery. *United States v.*

Field, 3 USCMA 182, 11 CMR 182. The second procedure was followed; the accused was again convicted of forgery; and the court-martial considered both convictions in imposing sentence. Upon review a second time, 5 USCMA 379, 18 CMR 3, the court held that it was proper to direct the court-martial's attention to the affirmed conviction for absence without leave, and proper for the court-martial to consider both convictions at the time of sentencing.

The second *Field* opinion also discusses the matter of resentencing in the following situation: where some, but not all, of multiple convictions are set aside, the case is thereupon remanded to the convening authority to consider the desirability of a rehearing, and the convening authority concludes that a rehearing would be undesirable or impracticable. The court concluded that in this situation the convening authority would be empowered to fix the sentence (subject, of course, to the proviso that the sentence could not be in excess of the legal limits or in excess of the sentence originally imposed by the court-martial). The situation discussed by the court is indistinguishable in principle from the case (of which the instant cases are examples) where the board of review sets aside one of multiple convictions and concludes, for its own part, that there is no basis for a rehearing, since we deem it plain (see *infra*, pp. 44-61) that the power of the board of review to determine the appropriateness of a sentence is no less broad than that of the convening authority. Accordingly, we set forth the views of the Court of Military Appeals,

as expressed in *Field* (5 USCMA at p. 384), *in extenso*:

However, what if a record of trial be returned to the convening authority after some, but not all, findings of guilty have been held erroneous by an appellate agency—and that authority concludes, as he properly may, that a rehearing is impracticable? If he elects to dismiss the charges under which the erroneous findings were returned, is he required to convene a court-martial for the purpose of reassessing sentence on the remaining untainted findings? We think not—in the absence of action on the part of appellate authorities setting aside, without limitation or qualification, the sentence returned by the court-martial. It is obvious that the convening authority would not have been required to return the case to a court-martial had he himself disapproved the erroneous findings in the first instance and dismissed the pertinent charges. It must be apparent that it has been our premise herein that, if some of the charges *are presented to a court-martial* for a rehearing purpose, then all must go to the same agency—some, of course, for consideration in connection with sentence only. In the suppositious situation; however, none of the charges has in fact been returned to the trial court level. Therefore, the premise is without application—with the result that no rehearing is then required.

Suppose, however, that the convening authority prefers another course and wishes a court-martial, and not himself, to reassess sentence solely on the basis of the findings deemed proper—all other charges having been dis-

missed by him. One possibility here, of course, assumes the form of revision proceedings, in conformity to Article 62, 50 USC § 649—but severe limitations on their use exist. See Manual, *supra*, paragraphs 80, 86*d*. May he then order a rehearing limited to the reassessment of sentence? Certainly the Federal civilian procedure permits resentencing by the trial court. Military law, on the other hand, does not seem to afford clear precedent for this action, and for this reason we have hesitated heretofore to pass on the propriety of this procedure. We incline to believe, however, that, since—as demonstrated earlier—it is permissible for a court-martial, following rehearing, to resentence on the basis of previous findings of guilt, after acquittal as to all reheard charges, there is no reason to suppose that a similar reassessment would be erroneous in a situation in which the tainted charges were dismissed—instead of having been reheard and the accused acquitted thereunder. It is, of course, unlikely that this practice will be much followed—for obvious and compelling reasons of a practical character—and we express no opinion concerning its desirability. Because we do not regard it as unlawful, however, it has been mentioned in the interest of completeness.

2. The convening authority's power to alter sentences did not begin with the Code, and the present statutory enactment and executive implementation are the natural culmination of a long course of history. With respect to the ultimate sentence to be approved, reviewing and confirming authorities have always had power to remit and mitigate sentences,

and since at least 1806 this power has been specified by statute. Article 89 of the Articles of War of 1806 (2 Stat. 369-370), provided:

Every officer authorized to order a general court martial shall have power to pardon or mitigate any punishment ordered by such court, except the sentence of death, or of cashiering an officer; which, in the cases where he has authority (by article 65)²¹ to carry them into execution, he may suspend until the pleasure of the President of the United States can be known; which suspension, together with copies of the proceedings of the court martial, the said officer shall immediately transmit to the President for his determination. And the colonel or commanding officer of the regiment or garrison where any regimental or garrison court martial shall be held, may pardon or miti-

²¹ Article 65, Articles of War of 1806 (2 Stat. 367):

ARTICLE 65. Any general officer commanding an army, or colonel commanding a separate department, may appoint general courts martial, whenever necessary. But no sentence of a court martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court martial in time of peace, extending to the loss of life, or the dismiss[al] of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval, and orders, in the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer, for the time being, as the case may be.

gate any punishment ordered by such court to be inflicted.

This power has been continued in reviewing authorities (including convening authorities) by specific provisions in each successive military code since that time.²²

Until 1920, it was permissible for a reviewing authority to return a record to the court-martial for proceedings in revision with a view to reconsidering an acquittal, reconsidering findings of not guilty of some of the offenses charged, or increasing the sentence. He could not, however, force the court to make findings of guilty or to increase the sentence, and he had no power to change the findings or increase the sentence himself.²³

As to the findings—as distinguished from the sentence—of a court martial, before 1916 the reviewing authority could merely approve or disapprove. Article 47 of the Articles of War, enacted in that year, for the first time empowered the reviewing authority to approve lesser offenses included within the offense found by the court-martial. He was to achieve this by approving only so much of the findings as involved guilt of the lesser offense and only so much of the sentence as was appropriate to that lesser offense.²⁴

²² Art. 112, Articles of War, 22 June 1874, R. S. 1342; Article of War 50 of 1916 and 1920 Articles of War (39 Stat. 658; 41 Stat. 797); Articles of War 47(f) and 51(a) of 1948 (10 U. S. C. (1946 ed., Supp. IV) 1518, 1523).

²³ See Fratcher, *Appellate Review in American Military Law*, 14 Missouri Law Review 15, 34-35.

²⁴ AW 47, 39 Stat. 657; and see Fratcher, *op. cit.*, p. 35.

Clearly present in these various statutory enactments was the concept that the convening authority was not limited to correcting errors of law, and that he was not bound to do only that which the court-martial would have done in his place. Rather, he was entitled to exercise his own independent discretion. In 1895, Colonel Winthrop felt free to say:²⁵

While the function of a court-martial is, regularly, completed in its arriving at a sentence or an acquittal, and reporting its perfected proceedings, its judgment, so far as concerns the *execution* of the same, is incomplete and inconclusive, being in the nature of a *recommendation* only. The record of the court is but the report and opinion of a body of officers, addressed to the superior who ordered them to make it, and such opinion remains without effect or result till reviewed and concurred in, or otherwise acted upon, by him. This superior, sometimes referred to as the Approving or Confirming Authority, but more commonly known in military parlance as the Reviewing Authority or Officer, is, as will presently be more fully indicated, the official—military commander or Commander-in-Chief—by whom the court was originally constituted and convened, or—where there has been a change in the command since the convening—his successor therein.

Article of War 47 (10 U. S. C. (1946 ed., Supp. IV) 1518) was the immediate predecessor of Article 64 of the Code. It continued the existing power of

²⁵ Winthrop, *Military Law and Precedents* (2d Ed. 1920 Reprint) p. 447.

convening authorities to approve sentences adjudged by courts-martial. It also provided that:

* * * The power to approve the sentence of a court-martial shall include—

(1) the power to approve or disapprove a finding of guilty and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;

(2) the power to approve or disapprove the whole or any part of the sentence; and

(3) the power to remand a case for rehearing under the provisions of Article 52.

These powers appear to be separate and capable of being exercised separately. The Manual For Courts-Martial, 1949, par. 87b,²⁶ so construed them, saying (p. 92): "Approval or disapproval of findings or a sentence or any part of the findings or sentence should not be left to implication. For example, in approving 'only so much' of a finding of guilty as involves a lesser included offense, all elements of the offense intended to be approved should be clearly included in the statement of approval." And with respect to sentences (p. 91): "When a sentence in excess of the legal limit is divisible, such part as is legal may be approved." Clearly, then, under the law which preceded present Article 64, convening authorities had wide powers to determine an appropriate sentence, irrespective of whether all or only some of the findings were affirmed. They were en-

²⁶ Executive Order 10020, 13 FR 7519.

titled to order rehearings, but were not required to do so.

In *Carter v. McClaughry*, 183 U. S. 365, the accused was convicted by general court-martial of sixteen offenses involving conspiracy to defraud the United States, causing false claims to be made against the United States, embezzlement, and conduct unbecoming an officer. He was sentenced to dismissal and confinement for five years and fined \$5,000. The President, who acted as the reviewing authority in the case, approved only four offenses—one of each general group—but approved the entire sentence. On habeas corpus, the accused contended (p. 380):

* * * That the entire sentence is illegal and void because the President having disapproved the conviction as to certain offences and having ordered the original sentence to stand, such sentence ceased to be the sentence of the court-martial.

The Court rejected that contention, saying (p. 385):

That contention, after all, amounts to no more than to say that if the court martial had acquitted on the disapproved findings, it must be assumed that the sentence would have been less severe, and therefore that the President should have sent the case back or mitigated the punishment, and that because he did not, the punishment must be conclusively regarded as increased. This is wholly inadmissible when the powers vested in the ultimate tribunal are considered.

* * * He [the President] might have referred the proceedings back to the court for revision, but he was not required to do so, if in his opinion this was not necessary, and the sentence was justified by the findings which he did approve. As President he might have exercised his constitutional power to pardon, or as the reviewing authority he might have pardoned or mitigated the punishment adjudged except that of dismissal, although he had no power to add to the punishment. He did not think it proper to remand, to mitigate or to pardon. * * * [183 U. S. at 387].²⁷

This history, which leaves no doubt that the initial reviewing authority has always had power to alter court-martial sentences in accordance with the advice he receives as to the law and his own impression of the requirements of justice and discipline, effectively disposes of any claim that the sentence ultimately approved must conform precisely to that specifically imposed by the court-martial for the exact finding or findings ultimately approved. It has never been demanded that a court-martial case be sent back to the trial body for adjusting the sentence to the later approved findings.

3. With this background, a subcommittee of the Committee on Armed Services, United States Senate, 81st Congress, conducted hearings on the Code. The Code had been drafted by a committee appointed

²⁷ It is impossible to avoid the *Carter v. McCloughry* holding by contending that the President merely refused to exercise executive clemency in the case. The action of the President upon a court-martial sentence is judicial in character. *Runkle v. United States*, 122 U. S. 543.

by Secretary of Defense Forrestal, headed by Professor Edmund M. Morgan, Jr., of Harvard Law School. In his prepared statement filed with the committee, Professor Morgan spoke of the convening authority, acting in review, and said, "There is an initial review by the convening authority covering law, facts, credibility of witnesses and a *review of the sentence*" (Hearings before a Subcommittee of the Committee on Armed Services, United States Senate, 81st Cong., 1st Sess., on S. 857 and H. 4080, p. 36, emphasis added).

In its report to the Senate on the Code, the Committee commented on Article 64, stating (Senate Rep. No. 486, 81st Cong., 1st Session, p. 27):

ARTICLE 64. *Approval by the convening authority*

This article authorizes the convening authority to approve only such findings of guilty, and the *sentence or such part or amount of the sentence, as he finds correct in law and fact and determines should be approved.*

It substantially conforms to present practice in all the armed forces. The convening authority can approve a finding only if he finds that it conforms to the weight of the evidence and that there has been no error of law which materially prejudices the substantial rights of the accused. (See art. 59, commentary.) He may approve only so much of a finding as involves a finding of guilty of a lesser included offense. (See art. 59.) *He may disapprove a finding or a sentence for any reason.* [Emphasis added.]

There is nothing in the legislative history of the Code or the Manual provisions to indicate that Congress or the President intended to restrict the long-established power of the convening authority to determine personally an appropriate sentence. As indicated above, the contrary appears. The convening authority is entitled to determine sentence appropriateness without regard to what the court-martial might have done had it considered only the approved findings. The convening authority, in reviewing a case, is entitled to disapprove some of the findings of guilt and yet affirm the entire term of confinement, if such a sentence is legal and he believes it to be appropriate. CM 353349, *United States v. Gephart*, 4 CMR 306. Clearly, therefore, he may also reduce the sentence to make it appropriate to the findings he affirms.

B: BOARDS OF REVIEW POSSESS THE SAME POWER AS DOES THE CONVENING AUTHORITY TO WEIGH FACTS AND DETERMINE SENTENCE APPROPRIATENESS, WITHOUT REGARD TO WHAT THE COURT-MARTIAL MIGHT HAVE DONE HAD IT CONSIDERED ONLY THE FINDINGS AS AFFIRMED

1. The present law requiring appellate review of court-martial cases by boards of review grew out of an Army departmental practice which was adopted during World War I through a series of administrative orders. Section 1, General Orders No. 169, War Department, 29 December 1917, directed confirming authorities to defer publication of the confirmation of death sentences and execution of such sentences until the record of trial had been reviewed in the Office of The Judge Advocate General, and the confirming

authority had been advised there was no legal objection to execution of the sentence. This order was superseded, effective 1 February 1918, by Section 1, General Order No. 7, War Department, 17 January 1918, the text of which is reprinted in the Appendix, *infra*, pp. 68-71. This order established a Branch Office of The Judge Advocate General in France, provided for review in that office as well as in the Judge Advocate General's Office, and expanded the types of cases to be reviewed. Boards of review were set up by the Judge Advocate General to accomplish the review required by these General Orders.²⁸

The Articles of War, of 1920 gave statutory recognition to the boards of review.²⁹ They provided, *inter alia*, that the reviewing or confirming authority could not, in a contested case, order the execution of any general court-martial sentence involving death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, prior to review of the record of trial by a board of review. If the board of review and the Judge Advocate General agreed that the record of trial was legally sufficient to support the findings and sentence, the reviewing or confirming authority could then order the execution of the sentence. If the board of review and the Judge Advocate General agreed that the record of trial was not legally sufficient to support the findings or sentence, in whole or in part, or that errors of law had been committed injuriously affecting the sub-

²⁸ For detailed discussion of these orders and partial text of G. O. No. 169, see Fratcher, *supra*, at pp. 40-43.

²⁹ Article of War 50½, 41 Stat. 797-799.

stantial rights of the accused, the sentence was to be vacated in whole or in part. If the sentence was wholly vacated, the record was to be returned to the reviewing or confirming authority for proceedings in revision or for a decision as to whether he wished to order a rehearing or dismiss the case. If the board of review and the Judge Advocate General did not agree on a case, the record, with the holding of the board and the Judge Advocate General's dissent, was to be forwarded to the Secretary of War for the action of the President. The President could then confirm the action of the reviewing or confirming authority, in whole or in part, with or without remission, mitigation, or commutation, or disapprove any finding of guilty in whole or in part, and disapprove or vacate the sentence in whole or in part. Incident to disapproval, he could order a rehearing.³⁰

Apart from certain delegations of the President's confirming authority,³¹ appellate review at departmental level remained unchanged until February 1, 1949, at which time the 1948 amendments to the Articles of War became effective.³² For the first time, boards of review were given the authority " * * * to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact."³³ The power of the boards of review to determine the

³⁰ Fratcher, *op. cit.*, footnote 23, *supra*, pages 48-50.

³¹ See Exec. Order 9363, 23 July 1943, 3 Code Fed. Regs. 34 (Supp. 1943); Exec. Order 9556, 26 May 1945, 3 Code Fed. Regs. 70 (Supp. 1945).

³² 10 U. S. C. (1946 ed., Supp. IV) 1471-1593.

³³ Article of War 50 (g), 10 U. S. C. (1946 ed., Supp. IV) 1521.

legality of sentences was continued,³⁴ but they had no power to determine sentence appropriateness. The latter power was vested, however, in the Judge Advocate General and the newly created Judicial Council.³⁵ The significance of Article of War 50 here is that it added both of the extraordinary powers—to weigh facts and determine sentence appropriateness—previously confined to the first stage of review (review by the convening authority), to the second stage of review as well.

Petitioner Jackson (Br. 619, p. 22) is in error in his contention that, under the predecessor statute to Article 66, boards of review were required to return cases for a rehearing if they disapproved a part of the findings. Article of War 50 (d) read in part, as follows:³⁶

(3) When the Board of Review is of the opinion that the record of trial in any case requiring confirming action by the President

³⁴ Article of War 50 (e).

³⁵ Article of War 51 (a), 10 U. S. C. (1946 ed., Supp. IV) 1523: "The Judge Advocate General shall have the power to mitigate, remit, or suspend the whole or any part of a sentence in any case requiring appellate review under article 50 and not requiring approval or confirmation by the President, * * *"; Article of War 49, 10 U. S. C. (1946 ed., Supp. IV) 1520.

³⁶ Counsel for petitioner Jackson asserts that this case would have been governed, under the old law, by the procedures set out in Article of War 50 (e) (3), but this is in error. A sentence to life imprisonment was adjudged and approved here. Under Article of War 48, 10 U. S. C. (1946 ed., Supp. IV) 1519, it was, therefore, a case where confirming action by the Judicial Council, with the concurrence of the Judge Advocate General, was required. Accordingly, review by the board of review would have been governed by Article of War 50 (d) (3) and (4).

or confirming action by the Judicial Council is legally insufficient to support the findings of guilty and sentence, or the sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, it shall submit its holding to the Judge Advocate General and when the Judge Advocate General concurs in such holding, such findings and sentence shall thereby be vacated in accord with such holding and the record shall be transmitted by the Judge Advocate General to the appropriate convening authority for a rehearing or such other action as may be proper.

(4) In any case requiring confirming action by the President or confirming action by the Judicial Council in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, or the sentence, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action or for other appropriate action in a case in which confirmation of the sentence by the President is required under Article 48a.

If the board of review held a record of trial legally sufficient to support attempted rape, but legally insufficient to support premeditated murder and legally insufficient to support the sentence, under former law it would submit this holding to the Judge Advocate General. If he concurred, he could reduce the sentence to a legal and appropriate sentence under Ar-

ticle of War 51,³⁷ or return the case to the convening authority for a rehearing or such other action as might be proper. The convening authority could either order a rehearing or reduce the sentence to one which was legal and appropriate for the offense affirmed.³⁸ If the Judge Advocate General did not agree with the board of review, he would forward the case to the Judicial Council, a group of three general officers constituted in his office. If the Judicial Council agreed with the Board's holding of legal insufficiency and the Judge Advocate General then concurred, both had the power to reduce the sentence.³⁹ If the Judge Advocate General still disagreed, a case involving life imprisonment would be forwarded to the Secretary of the Army for final determination.⁴⁰ This official also had the power to reduce the sentence without reference to the court-martial.⁴¹ Thus, under prior law, petitioners would not have been entitled to a rehearing before the court-martial on the sentence, but merely to adjustment by a different authority.

³⁷ 10 U. S. C. (1946 ed., Supp. IV) 1523. .

³⁸ The 1949 Manual said (par. 89, p. 100): "A rehearing may not be ordered by an authority empowered to take that action if, upon taking his final action, he approved a part of the sentence." By implication, the convening authority could elect to approve such part of the sentence as represented a legal and appropriate sentence for the approved finding, rather than disapprove all of the sentence and order a rehearing. Such a procedure would be consistent with the statutory enactment and its predecessors.

³⁹ See Article of War 49, 10 U. S. C. (1946 ed., Supp. IV) 1520, "Powers incident to power to confirm."

⁴⁰ Article of War 48b, 10 U. S. C. (1946 ed., Supp. IV) 1519.

⁴¹ See Article of War 49, *supra*, footnote 39.

2. As noted above (p. 43), the Code was drafted by a committee headed by Professor Edmund M. Morgan, Jr. In his testimony before the Senate Subcommittee, Professor Morgan stated, in speaking of boards of review:

* * * the board of review, now, has very extensive powers. It may review law, facts, and practically, sentences; because the provisions stipulate that the board of review shall affirm only so much of the sentence as it finds to be justified by the whole record. It gives the board of review * * * the power to review facts, law and sentence, and to judge the credibility of witnesses and to make new findings * * * insofar as they may be in favor of the accused * * *. [Hearings before a Subcommittee of the Committee on Armed Services, United States Senate, 81st Cong., 1st Sess., on S. 857 and H. R. 4080, p. 42.]

The Judge Advocates General of the Army and Navy appeared before the congressional committees and indicated opposition to lodging in the board of review the proposed authority to alter sentences. Having in mind the position taken by those officials, the Congress nevertheless decided to give boards of review the power to determine sentence appropriateness, as proposed by the drafting committee. This is shown by the following exchange at page 311 of the cited hearing:

Senator KEFAUVER. The next controversial subject is the board of review * * *.

Professor MORGAN. Yes.

Senator KEFAUVER. The board of review.

Professor MORGAN. The first thing I understand on that, Senator, is that they [the services] do not want the board of review to handle sentences, is that right?

Mr. GALUSHA. That is right.

Senator KEFAUVER. That is right.

* * *

Senator SALTONSTALL. Mr. Chairman, I do not want to make hasty decisions, but if you feel the same way, I would say very clearly that I believe they should have the right to reduce sentences.

Senator KEFAUVER. I think undoubtedly it should be there. We will check that as satisfactory, and we will pass on to the next item. * * *

In its report on the bill to the full Senate, the Committee had this to say with respect to Article 66:

The Board of Review shall affirm a finding of guilty of an offense or a lesser included offense * * * if it determines that the finding conforms to the weight of the evidence and that there has been no error of law which materially prejudices the substantial rights of the accused. * * * The Board may set aside, on the basis of the record, any part of a sentence, either because it is illegal or because it is inappropriate. It is contemplated that this power will be exercised to establish uniformity of sentences throughout the armed forces. [Senate Rep. No. 486, 81st Cong., 1st Sess., page 28.]

The code provisions giving boards of review authority over sentences had a similar history in the

House of Representatives. See House Report No. 491, 81st Congress, 1st Session, page 31. The attitude of the House Committee on Armed Services was exemplified by the statement of Congressman Rivers during discussion of the bill in the House of Representatives:

Mr. RIVERS. * * * Members of the armed services charged with commission of crimes are guaranteed more rights than any civilian enjoys today in our Nation. Notable among these are as follows:

* * * * *

Third. The Board of Review reviews the facts as well as the law with full authority to remit the sentence or any part thereof and to reverse the case.

* * * * *

The above are notable advances, and guaranties in future days that are to come. * * * [95 Cong. Rec. 5729, May 5, 1949.]

Thereafter, Congress enacted Article 66 of the Code, 50 U. S. C. 653, codified and reenacted as 10 U. S. C. 866. Article 66 (c) provided in pertinent part:

(c) In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and

determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.⁴²

3. The United States Court of Military Appeals, which was created by Article 67 of the Code as a court of last resort in the military appellate system, has often had occasion to interpret the sentence power given to boards of review by Congress. As early as *United States v. Keith*, 1 USCMA 442, 4 CMR 34, the problem was before that court. Keith had been convicted of misbehavior before the enemy and desertion, and sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for five years. The findings and sentence were approved by the convening authority and affirmed by a board of review. The Court of Military Appeals reversed the conviction of misbehavior and affirmed that of desertion. But that was not the end of its problem, for the question of appropriate sentence remained. The court stated its holding in these words (1 USCMA at 451):

For reasons mentioned earlier herein the decision of the board of review as to the offense of misbehavior before the enemy is reversed. However, the decision as to the offense of desertion is affirmed. Were the setting of the present case a civilian one, we would experience no difficulty in remanding to the court trying the accused for reconsideration of sen-

⁴² Because of its authority to weigh facts, the board of review applies a test of reasonable doubt, rather than substantial evidence, in determining evidential sufficiency. See the Statement, *supra*, p. 9.

tence or for retrial. In a military situation, however—and for reasons which must be apparent to all—this disposition of the matter is impracticable, if not impossible of achievement. In view of the lapse of time involved, it is highly probable that the court-martial which tried the accused, Keith, is no longer functioning as such. Through change of assignment, or otherwise, its members, indeed, may be scattered beyond recall. Even assuming the contrary in the present situation, the mentioned impossibility is certain to exist in many others involving an identical problem. Remand to the trial forum, for virtually any purpose in the military scene, is a difficult business, and remand from this Court simply an unworkable device. Fortunately, it is also an unnecessary one. The Uniform Code of Military Justice, Article 66 (c), 50 U. S. C. § 653, provides as follows:

“In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilt, *and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.* In considering the record, it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.” [Emphasis added.]

Had the board of review, following its appearance before that body, disapproved the

findings of guilty as to the misbehavior charge in the present case, it could have affirmed only "such part or amount of the sentence, as it * * * [found] correct in * * * fact and * * * [determined], on the basis of the entire record, should be approved." This Court is without statutory authority to act in such a manner. We may, however, correct a board of review in matters of law—and this we have done in the instant case with respect to board action on the charge specifying an instance of misbehavior. Accordingly, we now remand the case to The Judge Advocate General, United States Army, for reference to the board of review for the purpose of determining the adequacy of the sentence. See Uniform Code of Military Justice, Article 67 (f), 50 U. S. C. § 674. [sic] in doing this we are not to be understood as expressing any view concerning the appropriateness to the offense of desertion of the sentence adjudged by the court-martial which tried petitioner. We merely suggest that, in the absence of a sentence exceeding maximum legal limits, we are, by the statute creating this Court, without authority to determine the question.

In *United States v. Bigger*, 2 USCMA 297, 8 CMR 97, the board of review had reduced a conviction from premeditated to unpremeditated murder and also reduced the sentence from death to life imprisonment. After quoting Article 66 (c), Uniform Code of Military Justice, the Court of Military Appeals said (2 USCMA at pp. 304-305):

Clearly the board of review was acting within the authority of Article 59 (b)⁴³ when it approved a finding of guilty of unpremeditated murder, a lesser included offense of that found by the court-martial. If it had that power then by Article 66 (c), it could approve only such sentence or part thereof as was correct in law. The reduced finding rendered the sentence as originally imposed illegal so unless the board had the power to change the sentence to confinement it had no alternative other than to grant a new trial. Going one step further, if it must grant a new trial then Congress intended to restrict Article 59 (b) in a manner neither expressed nor implied.

* * *

* * * If we consider, compare, and fit the quoted provisions into a pattern, we must conclude that Congress intended to authorize boards of review to affirm findings of guilty of lesser included offenses and that if by so finding the sentence imposed becomes illegal, to permit the board to substitute a lesser legal sentence. Conceding this permits boards of review to commute in the field of murder, it is what we believe Congress intended to accomplish when it authorized boards of review

⁴³ Article 59 (b) provides:

Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm so much of the finding as includes a lesser included offense.

Both "approval" and "affirmance" appear to be words of art in military law. In both the Code and the Manual, "approval" is ordinarily used with reference to the convening authority's action; "affirmance" with reference to the action of the board of review and the Court of Military Appeals.

to evaluate facts, reduce findings, and adjust sentences to fit the offenses affirmed.

In *United States v. Stene*, 7 USCMA 277, 22 CMR 67; the accused was found guilty of three offenses and sentenced to dismissal by the court-martial. The board of review reversed as to one offense, affirmed the other two findings, and affirmed the sentence, having found it to be appropriate. The Court of Military Appeals affirmed, stating (p. 279):

A right to fit the punishment to the crime is thus vested in that agency [the board of review], but no such power has been conferred on us. Here the board concluded that the sentence as imposed by the court-martial was legal and appropriate in all respects for the offenses which were affirmed.

The opinion then sums up the court's interpretation of Article 66 (c), as follows (p. 281):

Over the five-year period of this Court's existence, we have repeatedly returned cases to boards of review for reassessment of sentence when a specification has been dismissed or the findings set aside by us. In addition, those agencies have long determined the appropriateness of sentences in the light of altered and modified findings. The power of a board to fix the quantum of punishment with or without affirming all findings is no longer in doubt. The principles controlling in that area have become so well fixed that little need be said concerning their place in our practice and procedure. However, at the risk of being redundant, we repeat that in military law, a single inclusive sentence is imposed, and un-

less a board of review has the power to affirm a sentence in whole or in part when findings are modified, the whole appellate superstructure must be redesigned. One of the cardinal principles set out in Article 66 of the Code is that a board of review may affirm all or part of the findings and determine a specially suited sentence from the entire record. That obviously means the record as it stands or as it has been changed by action on the findings. That must necessarily follow, for in some instances, the punishment imposed by the court-martial is assessed solely on the most serious aspect of the criminal transaction even though it may have been charged in several ways. In other situations, the total sentence may be determined by totaling the punishment considered appropriate for each crime. The record does not disclose the method used, but to make a workable system, some appellate agencies must have the power to adjust the sentence if the findings are changed on appeal. Congress has given boards of review the authority to determine the appropriateness of sentence, and surely within that grant of power would be the right to make the determination regardless of the action on the findings, in all cases where the sentence is one which the board is authorized to change.

4. In sum, in the light of established military practice, it is reasonable to conclude that when Congress gave boards of review the power to determine sentence appropriateness, as well as legality, it empowered the boards to act *without regard to what the court-martial might have done in imposing a sentence,*

had it been faced with only the affirmed findings of guilt. Congress intended boards of review to exercise both of the major review powers once reserved to the convening authority alone: the power to weigh facts and the power to determine not only sentence legality, but also sentence appropriateness.

The power over the sentence must exist if the first power to review the facts is to be exercised effectively. There would be small advantage to the accused in the board's right and duty to weigh facts if it could not also adjust the sentence to render it appropriate to the findings of guilt affirmed. And, certainly, the whole military appellate system would be unworkable if a case had to be returned to the court-martial for resentencing because a reviewing authority reduced or reversed some of the findings." In this case, for example, the accused were tried in Korea. Through transfer to other assignments, the court-martial members no doubt have been scattered over the face of the earth. Doubtless, some are no longer in the service. It is unlikely that the court-martial could be re-assembled at all, and certain that it could not be done

"From the time that the new Code became effective on May 31, 1951, until December 31, 1955, the boards of review in all of the military services modified the findings in 2,861 cases, and the Court of Military Appeals modified the actions of boards of review in an additional 357 cases. Annual Report of the United States Court of Military Appeals, the Judge Advocates General of the Armed Forces and General Counsel of the Department of the Treasury, for the period 1 January 1955 to 31 December 1955. These figures do not, of course, include the innumerable cases (as to which no accurate data are available) in which findings have been modified by convening authorities.

except with great difficulty. Yet, if the return of a case for resentencing is considered to be a revision proceeding under Article 62 of the Code—a procedure limited to the correction of errors or omissions which can be rectified without prejudice to the accused—the proceeding “may be taken *only* by the members of the court who participated in the findings and sentences.” Manual, par. 80b, p. 130. (Emphasis added.) In most cases, then, the accused would go unsentenced, for the members could not be reassembled.

If the return of a case to a court-martial for resentencing is regarded, on the other hand, as a limited rehearing under Article 66 (d), it must be considered that “[e]very rehearing shall take place before a court-martial composed of members who were *not* members of the court-martial which first heard the case”. Manual for Courts-Martial, 1951, par. 92, p. 160. In net effect, this means that rehearings for the purpose of resentencing would be conducted before officers who were unfamiliar with the case and who would determine the sentence on the basis of the cold record. The very same thing can be done by the board of review more expeditiously, more intelligently, and more fairly. Furthermore, only the board of review is in a position to have in mind the sentences imposed in similar cases when determining sentence appropriateness, a major consideration in the eyes of Congress (*supra*, p. 51).

Congress must have known of the limitations, both legal and practical, upon rehearing and revision proceedings, for they are a carry-over from prior law. It must have intended, we submit, that reviewing

authorities might exercise the powers of sentence adjustment conferred upon them free from the completely hampering consequences which would flow from the notion that they are bound to ascertain what is in fact unknowable in a system characterized by the sentence in gross—what the court-martial might have done had it apportioned its sentence.

Petitioner Jackson urges that, if the board of review has the power to determine an appropriate sentence for the findings which it affirms, an injustice will result. As noted *supra*, pp. 50-52, review of sentences by boards of review was considered (and it has proved to be) an ameliorative provision. Essentially, his complaint is that, although his murder conviction was set aside, the sentence, in his particular case, was adjusted to the maximum for attempted rape. That does not establish injustice; nor does it detract from the conclusion that it was for Congress alone to decide whether the power to adjust military sentences might reasonably be conferred upon reviewing authorities.⁴⁵

⁴⁵Jackson also contends (Br. No. 619, p. 27) that ambiguous statutes must be resolved in favor of accused persons; that Article 66 is ambiguous; and that this ambiguity is conclusively shown by the division of the courts of appeals on the petitions for habeas corpus filed in the instant cases and in *De Coster*. This reasoning is faulty. The opinion in *De Coster v. Madigan*, 223 F. 2d 906 (C. A. 7), is premised, at least in part, on the proposition that the court-martial did not give any consideration to the offense of attempted rape at the time of sentencing and that no part of the sentence adjudged was imposed for that offense (see *supra*, p. 27). No consideration was given there to the question of whether, had the sentence been imposed in contemplation of both offenses, the board of review would have had the power to reduce it.

III

THE ADJUSTMENT OF SENTENCE BY THE BOARD OF REVIEW
WAS APPROPRIATE

Petitioners suggest that the sentence affirmed by the board of review, even if legal, was unreasonably harsh, and that, therefore, they are entitled to re-sentencing at the hands of a court-martial. This position is without merit.

In the first place, we note that the facts set forth by the board of review in its opinion (CM 347258, *United States v. Fowler*, 2 CMR 336) reveal that this attempted rape was distinguished principally by its brutality and that reasonable men could well conclude that the maximum sentence was appropriate. The accused admitted, in their voluntary pretrial statements (2 CMR at 342):

* * * that on the night in question the three accused set out from camp in search of sexual intercourse; that they went to a nearby village and entered a Korean house; that, while Fowler stood guard, DeCoster and Jackson seized their victim, removed the clothing from the lower part of her body and carried her to a ditch where DeCoster unsuccessfully attempted to overcome her resistance and have intercourse with her; that Jackson and DeCoster then carried her to a house where DeCoster again tried without success to have intercourse while his companions stood guard; and that some Koreans in an attempt to rescue the woman fired shots which caused the accused to return their fire and flee.

The following morning, the victim was found dead as the result of a gunshot wound. The body was semi-nude, the right wrist was bruised, and "the vaginal vault was 'gaping' and contained spermatozoa; * * *" (2 CMR at 338). It is apparent that the court-martial did not go beyond the express admissions in the pretrial statements in finding attempted rape, rather than rape (the offense charged). In addition, the board of review gave the accused the benefit of its doubt as to whether or not they had inflicted the death wound. But the facts which remained for consideration demonstrated that this was an aggravated and brutal case.

Furthermore, if the sentence is legal, the question of its severity is not one which may be considered on habeas corpus. *Carter v. McClaughry*, 183 U. S. 365, 401 ("the sentences of courts martial * * * cannot be revised by the civil courts save only when void because of an absolute want of power * * *"); *Sanford v. Callan*, 148 F. 2d 376, 377 (C. A. 5); *Allen v. Wilkinson*, 129 F. Supp. 73, 74-75 (D. C. Pa.); *Ex parte Campo*, 71 F. Supp. 543 (S. D. N. Y.); *Flackman v. Hunter*, 75 F. Supp. 871 (D. Kan.). The maximum punishment which may be imposed for offenses is a matter of policy which in military law has been left to the President.* The sentence here does not exceed the maximum permissible for the

* Article 56, UCMJ, 10 U. S. C. 856: "The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."

offense" and has been determined to be appropriate by an agency charged with making that determination. Therefore, there is no basis for judicial review of that action.

There is no concept in military law that a sentence may be legal and yet reversible as arbitrarily and unnecessarily harsh. Petitioners' contention that *United States v. Voorhees*, 4 USCMA 509, 16 CMR 83, stands for this proposition is not correct. In *Voorhees*, the accused was convicted of willful disobedience (5 years maximum penalty; Table of Maximum Punishments, MCM, 1951, par. 127c, p. 220); two violations of a general regulation (2 years maximum penalty for each; Table of Max. Punishments, *supra*, p. 221); and two minor disorders, the maximum penalty for each being 4 months. The court-martial sentenced the accused to dismissal from the service, which is an authorized punishment for any violation of the Uniform Code by an officer. MCM, 1951, par. 126d, p. 208. The board of review disapproved the convictions as to the three major offenses and one of the minor ones, and affirmed the sentence, which was a legal punishment for the finding affirmed. The United States Court of Military Appeals reversed, saying that in this instance the case had to be submitted to a court-martial for resentencing. But here a peculiar feature of military law came into play. Although a board of review possesses the power to reduce or mitigate a

⁴⁷ Table of Maximum Punishments, MCM, 1951, par. 127c, p. 225.

sentence, Article 66 (c), UCMJ, *supra*, it has no power to *commute* a sentence (i. e., change the nature of the penalty) if the sentence is a legal punishment for the offense. Article 71 (b), UCMJ; MCM, 1951, par. 105a, p. 174; *United States v. Goodwin*, 5 USCMA 647, 18 CMR 271; *United States v. Freeman*, 4 USCMA 76, 15 CMR 76; cf. *United States v. Bigger*, 2 USCMA 297, 8 CMR 97, where the death sentence was *illegal* for the offense affirmed by the board of review. A sentence to dismissal is a sentence which cannot be mitigated or reduced in quantity or quality; it can only be commuted. *United States v. Goodwin*, *supra*, at pp. 658-659; *United States v. Voorhees*, *supra*, at p. 542. Therefore; in the *Voorhees* case, the board of review had no free choice in the sentence which it could affirm. It had affirmed one conviction for which a sentence to dismissal was legal, even though it disapproved numerous other offenses. It could not commute that sentence. Accordingly, it could only (a) disapprove the sentence in its entirety and permit the accused to go unpunished; (b) affirm a sentence which had been imposed for many serious offenses but which was now supported by only one minor one; or (c) order a rehearing before a court-martial for sentencing only. The Court of Military Appeals therefore held that where the board of review lacks authority to compensate for the convictions it reverses by a reduction in the sentence, the board must order a rehearing before a court-martial. This rule, if it can be said to amount to one, applies *only* when there are no substantial offenses remaining to support the sentence.

United States v. Stene, supra, 7 USCMA 227, 22 CMR 67.

The *Voorhees* decision obviously has no application to the cases before this Court. Here, the accused were sentenced to life imprisonment, a punishment which could be mitigated. After disapproving the conviction for premeditated murder, the board of review reduced the sentence to twenty years confinement, a sentence which is less than but similar to life imprisonment, both in quality and quantity. No question of commutation was presented. The board acted only after expressly determining that the approved sentence was an appropriate penalty. CM 347258, *United States v. Fowler*, 2 CMR 336 at 345, 346. The Court of Military Appeals has never held that a board of review must reduce a confinement sentence to less than the maximum authorized for the conviction or convictions affirmed, where it disapproves some of the convictions upon which the original sentence was based. It is only necessary, the court concluded in *Voorhees*, that the board have the power to modify the penalty (which it did *not* have in *Voorhees*), and that it expressly conclude that the sentence which it affirms is appropriate.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be affirmed.

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APRIL 1957.

APPENDIX

GENERAL ORDERS } WAR DEPARTMENT,
No. 7 } Washington, January 17, 1918.

I—Section I, General Orders, No. 169, War Department, 1917, is rescinded and the following rules of procedure prescribed by the President are substituted therefor. This order will be effective from and after February 1, 1918:

1. Whenever, in time of war, the commanding general of a territorial department or a territorial division confirms a sentence of death, or one of dismissal of an officer, he will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with a recital that the execution of the sentence will be directed in orders after the record of trial has been reviewed in the office of the Judge Advocate General, or a branch thereof, and its legality there determined, and that jurisdiction is retained to take any additional or corrective action, prior to or at the time of the publication of the general court-martial order in the case, that may be found necessary. Nothing contained in this rule is intended to apply to any action which a reviewing authority may desire to take under the 51st Article of War.

2. Whenever, in time of peace or war, any officer having authority to review a trial by general court-martial, approves a sentence imposed by such court which includes dishonorable discharge, and such officer does not intend to suspend such dishonorable discharge until the soldier's release from confinement, as

provided in the 52d Article of War, the said officer will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with the recital specified in rule 1. This rule will not apply to a commanding general in the field, except as provided in rule 5.

3. When a record of trial in a case covered by rules 1 or 2 is reviewed in the office of the Judge Advocate General, or any branch thereof, and is found to be legally sufficient to sustain the findings and sentence of the court, the reviewing authority will be so informed by letter, if the usual time of mail delivery between the two points does not exceed six days, otherwise, by telegram or cable, and the reviewing authority will then complete the case by publishing his orders thereon and directing the execution of the sentence. If it is found, upon review, that the record is not sufficient to sustain the findings and sentence of the court, the record of trial will be returned to the reviewing authority with a clear statement of the error, omission, or defect which has been found. If such error, omission, or defect admits of correction, the reviewing authority will be advised to reconvene the court for such correction; otherwise he will be advised of the action proper for him to take by way of approval or disapproval of the findings or sentence of the court, remission of the sentence in whole or in part, retrial of the case, or such other action as may be appropriate in the premises.

4. Any delay in the execution of any sentence by reason of the procedure prescribed in rules 1, 2, or 3 will be credited upon any term of confinement or imprisonment imposed. The general court-martial order directing the execution of the sentence will recite that the sentence of confinement or imprisonment will commence to run from a specified date, which

date, in any given case, will be the date of original action by the reviewing authority.

5. The procedure prescribed in rules 1. and 2 shall apply to any commanding general in the field whenever the Secretary of War shall so decide and shall direct such commanding general to send records of courts-martial involving the class of cases and the character of punishment covered by the said rules, either to the office of the Judge Advocate General at Washington, D. C., or to any branch thereof which the Secretary of War may establish, for final review, before the sentence shall be finally executed.

6. Whenever, in the judgment of the Secretary of War, the expeditious review of trials by general courts-martial occurring in certain commands requires the establishment of a branch of the Judge Advocate General's office at some convenient point near the said commands, he may establish such branch office and direct the sending of general court-martial records thereto. Such branch office, when so established, shall be wholly detached from the command of any commanding general in the field, or of any territorial, department, or division commander, and shall be responsible for the performance of its duties to the Judge Advocate General.

[250.4, A. G. O.]

II—There is hereby established, in aid of the revisory power conferred on the Judge Advocate General of the Army by section 1199, Revised Statutes, a branch of the office of the Judge Advocate General, at Paris, France, or at some other point convenient to the headquarters of the American Expeditionary Forces in France, to be selected by the officer detailed as the head of such branch office, after conference with the commanding general of the American Expeditionary Forces in France. The officer so de-

tailed shall be the Acting Judge Advocate General of the American Expeditionary Forces in Europe, and shall report to and be controlled in the performance of his duties by the Judge Advocate General of the Army.

The records of all general courts-martial in which is imposed a sentence of death, dismissal, or dishonorable discharge and of all military commissions originating in the said expeditionary forces, will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the findings or sentence invalid or void, in whole or in part, to the end that any such sentence or any part thereof so found to be invalid or void shall not be carried into effect. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and all proceedings thereon to the Judge Advocate General of the Army for permanent file.

[250.4, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

JOHN BIDDLE,

Major General, Acting Chief of Staff.

OFFICIAL:

H. P. McCAIN,

The Adjutant General.